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# TRANSCRIPT OF RECORD

# Supreme Court of the United States

OCTOBER TERM, 1947

No. 49

WILLIAM SHAPIRO, PETITIONER,

218

THE UNITED STATES OF AMERICA

ON WEIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CENTIONARY FILED MARCH 5, 1947.



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# OCTOBER TERM, 1947

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# IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

United States of America,

AGAINST

WILLIAM SHAPJRO, Defendant-Appellant

STATEMENT UNDER RULE 13

This cause was commenced by the filing by the United States Attorney for the Southern District of New York, of an information containing forty-eight (48) separate counts against the defendant, William Shapiro, on December 20th, 1944. The defendant pleaded not guilty on January 11th. The defendant was not arrested nor was bail taken. The defendant was first tried before Hon. J. Waties Wating, District Judge, and a jury on September 11th, 12th, 13th and 14th, 1945, resulting, at the end of the presentation of the Government's case, in a dismissal of counts 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38 and 45 of the information on the motion of the Government, and in the dismissal of counts 4, 5, 6 and 47 of the information on the motion of the defendant, thus eliminating thirty (30) counts from the information and leaving eighteen (18) counts undisposed of. As to these counts, a mistrial resulted.

The defendant was tried again on the remaining eighteen. (18) counts of the information before Hon. H. Church Ford, [fol. 2] District Judge, and a jury, on December 14th, 1945. The trial resulted in a dismissal of count 48 of the information on the motion of the Government, and counts 2, 36, 37, 39, 40 and 41 of the information on the motion of the defendant. Counts 1, 3, 7, 8, 9, 10, 11, 42, 43, 44 and 46 were given by the Court to the jury. The jury returned a verdict of not guilty as to counts 1, 3, 42, 43, 44 and 46 and a verdict of guilty against the defendant on counts 7, 8, 9, 10 and 11 of the information. Sentence was imposed and judgment was entered on Dec. 18, 1945. A motion for arrest of judgment and for a new trial was made on Dec. 19, 1945, and an order denying the defendant's motion for arrest of judgment and for a new trial was entered on January

2nd, 1946. Notice of Appeal on behalf of the defendant was filed on January 4th, 1946. There has been no change of parties herein.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

#### INFORMATION

Now comes John F. X. McGohey, United States Attorney for the Southern District of New York, leave having first been had and obtained, and respectfully informs this Court:

That heretofore, to wit, on or about the 20th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, of 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Murray Silverman of 15 crates of lettuce, and 5 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426, duly issued by the Price Administrator, unlawfully, wilfully, and knowingly, evaded the provisions of the said Revised Maximum Price Regulation No. 426, by demanding, making, and requiring the said Murray Silverman to purchase a commodity, to wit, 25 erates of celery at \$4.50 per crate as a condition of the sale to him and as an integral part thereof of the aforesaid 15 crates of lettuce and 5 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder):

# :[fol. 4] Second Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 26th day, of November 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Murray Silverman of 10 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said making and requiring the said Murray Silverman to purchase a commodity, to wit, 10 crates of celery at \$5.50 per crate as a condition of the sale to him and as an integral part thereof of the aforesaid 10 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, Appendix, Section 901 ct seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Third Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 28th day of December 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale [fol. 5] by him on said date to J. Simensky & Co., of 5 boxes of apples and 5 boxes of grapes, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said J. Simensky & Co., to purchase a commodity, to wit, 5 crates of beets at \$2.50 per crate, and 5 crates of lettuce at \$5.29 per crate, as a condition of the sale to them and as an integral part thereof of the aforesaid 5 boxes of apples and 5 boxes of grapes; against. the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder);

#### Fourth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 30th day of November 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Far Rockaway Fruit Market, Inc., of 5 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and re quiring the said Far Rockaway Fruit Market, Inc., toour-[fol. 6] chase a commodity, to wit, 10 bags of potatoes at \$4.15 per bag as a condition of the sale to them and as an integral part thereof of the aforesaid 5 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et. seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

# Fifth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 2nd day of November 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Far Rockaway Fruit Market, Inc., of 5 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Far Rockaway Fruit Market, Inc., to purchase a commodity, to wit 10 bags of potatoes at \$4.15 per

bag as a condition of the sale to them and as an integral part thereof of the aforesaid 5 crates of carrots, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### [fol. 7]

#### Sixth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 8th day of December 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Far Rockaway Fruit Market, Inc., of 5 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requir-> ing the said Far Rockaway Fruit Market, Inc., to purchase a commodity, to wit, 8 crates of celery at \$5.00 per crate as a condition of the sale to them and as an integral part thereof of the aforesaid 5 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 eq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Seventh Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 20th day of August \$7943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New [fol. 8] York, the defendant herein, in connection with the

sale by him on said date to Ernest Davino of 10 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Ernest Davino to purchase a commodity, to wit, 10 bags of potatoes at \$4.50 per bag as a condition of the sale to him and as an integral part there-f of the aforesaid 10 crates of lettuce; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Eighth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 28th day of August 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro. having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale. by him on said date to Ernest Davino of 7 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the. said Ernest Davino to purchase a commodity, to wit, 10 baskets of peas at \$3.50 per basket as a condition of the [fol. 9] sale to him and as an integral part thereof of the aforesaid 7 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 30th day of August 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Ernest Davino of 2 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making, and requiring the said Ernest Davino to purchase a commodity, to wit, 7 baskets of peas at \$5.50 per basket as a condition of the sale to him and as an integral part thereof of the aforesaid 2 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

[fol. 10] Tenth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 10th day of September 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Ernet Davino of 6 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Ernest Davino to purchase a commodity, to wit, 10 boxes of Persian melons at \$4.00 per box as a condition of the

sale to him and as an integral part thereof of the aforesaid 6 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Eleventh Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 19th day of November 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New [fol. 11] York, the defendant herein, in connection with the sale by him on said date to Ernest Davino of 5 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said-Ernest Davino to purchase a commodity, to wit, 10 crates of celery at \$4.00 per crate as a condition of the sale to him and as an integral part thereof of the aforesaid 5 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Twelfth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 21st day of September 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by them on said date to Irving Horowitz of 5 crates of lettuce, the price of which was regulated by Revised Max-

imum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Irving Horowitz to purchase a commodity, to wit, 15 [fol. 12] boxes of honeydew melons at \$4.25 per box as a condition of the sale to him and as an integral part thereof of the aforesaid 5 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Thirteenth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 5th day of October, 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Irving Horowitz of 5 crates of . lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Irving Horowitz to purchase a commodity, to wit, 10 bags of Idaho Potatoes at \$4.40 per bag as a condition of the sale to him and as an integral part thereof of the aforesaid 5 crates of lettuce; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

[fol. 13]

Fourteenth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 18th day of October 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Irving Horowitz of 6 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Irving Horowitz to purchase a commodity, to wit, 20 boxes of honeydew melons at \$3.00 per box as a condition of the sale to him and as an integral part thereof of the aforesaid 6 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Tile 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Fifteenth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 1st day of November 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New [fol-14] York, the defendant herein, in connection with the sale by him on said date to Irving Horowitz of 10 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Irving Horowitz to purchase a commodity, to w., 5 baskets of sweet potatoes at \$3.50 per basket as

a condition of the sale to him and as an integral part thereof of the aforesaid 10 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Sixteenth Count

And the said United States Attorney in manner and form as aforesaid respectfully informs this Court:

That heretofore, to wit, on or about the 12th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Irving Horowitz, of 5 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Irving Horowitz to purchase a commodity, to wit, 5 crates of celery at \$4.30 per crate as a condition of the [fol. 15] sale to him and as an integral part thereof of the aforesaid 5 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

# Seventeenth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 2nd day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale

by him on said date to Yonkers Fruit Co. of 15 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Yonkers Fruit Co. to purchase commodities, to wit. 5 crates of carrots of \$5.15 per crate, 5 baskets of peas at \$4.63 per basket, and 5 baskets of sweet potatoes at. \$2.50 per basket as a condition of the sale to them and as an integral part thereof of the aforesaid 15 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 [fol. 16] Appendix, Section 901 et seq., United States Code. and the rules, regulations and orders duly adopted and issued thereunder).

Eighteenth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 5th day of September, 1944, at the Southern District of New York and within the Jurisdiction of this Court, William Shapiro, having its principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Yonkers' Fruit Co., of 25 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Yonkers Fruit Co. to purchase commodities, to wit, skets of peas at \$4.45 per basket, 5 baskets of sweet potatoes at \$2.50 per basket, and 10 boxes of Persian melons at \$5.09 per box as a condition of the sale to them and as an integral part thereof of the aforesaid 25 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

[fol. 17] That heretofore, to wit, on or about the 6th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Yonkers Fruit Co., of 7 crates of lettuce and 7 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Yonkers Fruit Co. to purchase a commodity, to wit, 10 baskets of peas at \$4.63 per basket as a condition of the sale to them and as an integral part thereof of the aforesaid 7 crates of lettuce and 7 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the Rules, regulations and orders duly adopted and issued thereunder).

#### Twentieth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 7th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Yonkers Fruit Co. of 5 crates [fol. 18] of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Yonkers Fruit Co. to purchase a commod-

ity, to wit, 10 baskets of peas at \$4.83 per basket as a condition of the sale to them and as an integral part thereof of the aforesaid 5 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Twenty-first Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 11th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Yonkers Fruit Co., of 7 crates of lettuce and 10 boxes of grapes, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Yonkers Fruit Co. to purchase a commodity, to wit, 25 baskets of sweet potatoes at \$3.00 per basket as a condition of the sale to them and [fol. 19] as an integral part thereof of the aforesaid 7 erates of lettuce and 10 boxes of grapes; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

### Twenty-second Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 12th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro having his principal place of business at 364 Washington

Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Yonkers Fruit Co. of 5 crates of lettuce and 5 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Yonkers Fruit Co. to purchase a commodity, to wit, 25 baskets of sweet potatoes at \$3.00 per basket as a condition of the sale to them and at an integral part thereof of the aforesaid 5 crates of lettuce and 5 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq.; United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

## [fol. 20] Twenty-third Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 15th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Stret, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Yonkers Fruit Co. of 20 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Yonkers Fruit Co. to purchase a commodity, to wit, 15 baskets of sweet potatoes at \$3.00 per basket as a condition of the sale to them and as an integral part thereof — the aforesaid 20 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

## Twenty-fourth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 14th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington [fol. 21] Street, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by him on said date to Morris Hyman of 5 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Morris Hyman to purchase a commodity, to wit, 15 boxes of Persian melons at \$3.00 per box as a condition of the sale to him and as an integral part thereof of the aforesaid 5 crates of lettuce, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duty adopted and issued thereunder).

## Twenty-fifth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 15th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New-York, the defendant herein in connection with the sale by him on said date to Morris Hyman of 3 crates of lettuce and 6 crates of carrots, the prices of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demand-[fol. 22] ing, making and requiring the said Morris Hyman to purchase a commodity, to wit, 15 boxes of Persian melons

at \$3.09 per box as a condition of the sale to him and as an integral part thereof of the aforesaid 5 crates of lettuce and 6 crates of carrots, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Twenty-sixth Count

And the said United States Attorney in Manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 20th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Morris Hyman, of 5 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Morris Hyman to purchase commodities oto wit, 18 boxes of Persian melons at \$3.00 per box, and 4 baskets of sweet potatoes at \$2.75 per basket as a condition of the sale to him and as an integral part thereof of the aforesaid 5 crates of lettuce; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United [fol. 23] States Code, and the rules, regulations and orders duly adopted and issued thereunder).

# Twenty-seventh Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 14th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, hav-

ing his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to P. Hoffman of 5 crates of lettuce, the price of which was regulated by Revised Maximum Price regulation No. 426 duly issued by the Price Administrator. unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said P. Hoffman to purchase a commodity, to wit, 15 boxes of Persian melons at \$3.19 per box as a condition of the sale to him and as an integral part thereof of the aforesaid 3 crates of lettuce: against the peace of the United States and their dignity and contrary to the form of the statute of the United States. in such case made and provided (Title 50 Appendix, Section 901 et seg.; United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

## Twenty-eighth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 15th day of September, 1944 at the Southern District of New York and [fol. 24] within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to P. Hoffman, of 5 crates of lettuce and 5 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Degulation No. 426 by demanding, making and requiritathe said P. Hoffman to purchase a commodity, to wit, 15 boxes of Persian melons at \$3.09 per box as a conditien of the sale to him and as an integral part thereof of the aforesaid 5 crates of lettuce and 5 crates of earrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Twenty-ninth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 16th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street. in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to P. Hoffman of 7 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, [fol. 25] wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said P. Hoffman to purchase a commodity, to wit, 30 boxes of Persian melons at \$3.19 per box as a condition of sale to him and as an integral part thereof of the aforesaid 7 crates of lettuce; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

# Thirtieth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court

That heretofore, to wit, on or about the 20th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to P. Hoffman of 7 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said P. Hoffman to purchase a commodity, to wit, 30 boxes of Persian melons at \$3.05 per box as a condition of the sale to him and as an integral part thereof of the aforesaid 7 crates of lettuce;

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section [fol. 26] 901 et seq., United State Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Thirty-first Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 15th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Benjamin Horowitz of 15 crates of lettuce and 10 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Benjamin Horowitz to purchase commodities, to wit, 25 baskets of sweet potatoes at \$3 per basket and 35 boxes of Persian melons at \$3.00 per box as a condition of the sale to him and as an integral part thereof of the aforesaid 15 crates of lettuce and 10 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seg., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

## Thirty-second Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

[fol. 27] That heretofore, to wit, on or about the 29th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Benjamin Horowitz of 10 crates of

lettuce the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Benjamin Horowitz to purchase a commodity, to wit, 15 baskets of sweet potatoes at \$2.70 per basket as a condition of the sale to him and as an integral part thereof of the aforesaid 10 crates of lettuce; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Thirty-third Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 30th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Benjamin Horowitz of 5 crates of carrots, the price of which was regulated by Revised Maximum [fol. 28] Price Regulation No. 426 duly issued by the Price. Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Benjamin Horowitz to purchase a commodity, to wit, 5 baskets of sweet potatoes at \$2.70 per basket as a condition of the sale to him and as an integral part thereof of the aforesaid 5 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder). .

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 2nd day of October, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapire, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Benjamin Horowitz of 20 boxes of grapes, 5 crates of lettuce and 5 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Benjamin Horowitz to purchase commodities. to wit, 10 baskets of sweet potatoes at \$2.70 per basket and 20 bags of onions at \$2.60 per bag as a condition of the sale to him and as an integral part thereof of the aforesaid 20 [fol. 29] boxes of grapes, 5 crates of lettuce and 5 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

· Thirty-fifth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 4th day of October, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Benjamin Horowitz of 5 crates of lettuce the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Benjamin Horowitz to purchase a commodity, to

wit, 10 baskets of sweet potatoes at \$2.50 per basket as a condition of the sale to him and as an integral part thereof of the aforesaid 5 crates of lettuce; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50. Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

# [fol. 30] Thirty-sixth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 28th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to S & I White of 10 crates of lattice and 15 boxes of grapes, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said S & I White to purchase a commodity, to wit, 25 bags of onions at \$2.00 per bag as a condition of the sale to them and as an integral part thereof of the aforesaid 10 crates of lettuce and 15 boxes of grapes; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

## Thirty-seventh Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 4th day of October, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York,

[fol. 31] the defendant herein in connection with the sale by him on said date to S & I White of 10 crates of lettuce and 10 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said S & I White to purchase commodities, to wit, 15 baskets of sweet potatoes at \$2.71 per basket and 20 bags of onions at \$2.00 per bag as a condition of the sale to them and as an integral part thereof of the aforesaid 10 crates of lettuce and 10 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

## Thirty-eighth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 8th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Fred Previ of 5 crates of lettuce the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully, wilfully and knowingly evaded the provisions of . the said Revised Maximum Price Regulation No. 426 by de-[fol. 32] manding, making and requiring the said Fred Previto purchase a commodity, to wit, 10 baskets of sweet potatoes at \$3.00 per basket as a condition of the sale to him and as an integral part thereof of the aforesaid 5 crates of lettuce; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Thirty-ninth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 25th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street. in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Martori & LaMont of 25 boxes of grapes and 10 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully- wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Martori & LaMont to purchase commodities, to wit, 20 boxes of Persian melons at \$3 per box and 20 boxes of Persian melons at \$3.28 per box as a condition of the sale to them and as an integral part thereof of the aforesaid 25 boxes of grapes and 10 crates of lettuce; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United [fol. 33] States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Fortieth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 25th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Martori and LaMont of 20 crates of lettuce the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully- wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Martori and LaMont to purchase a commodity, to

wit, 30 baskets of sweet potatoes at \$2.70 per basket as a condition of the sale to them and as an integral part thereof of the aforesaid 20 crates of lettuce; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Forty-first Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 29th day of September, 1944 at the Southern District of New York [fol. 34] and within the jurisdiction of this Court, William Shapiro having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Martori & LaMont of 40 crates of lettuce and 20 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully-wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Martori & LaMont to purchase commodities, to wit, 45 boxes of honeydew melons at \$3.25 per box, 45 bags of onions at \$3.00 per bag and 15 baskets of beans at \$3.50 per basket, as a condition of the sale to them and as an integral part thereof of the aforesaid 40 crates of lettuce and 20 crates of carrots: against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix. Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

Forty-second Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 6th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro,

having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Schwartz Produce Co., of 5 crates of lettuce and 5 crates of carrots the price of which was reg-[fol. 35] ulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully-wilfully and knowingly evaded the provisions of the said Revised, Maximum Price Regulation No. 426 by demanding, making and requiring said Schwartz Produce Co. to purchase commodities, to wit, 5 baskets of sweet potatoes at \$3.50 per basket, 13 boxes of Persian melons at \$3.00 per box and 6 baskets of peas at \$4.25 per basket as a condition of the sale to them and as an integral part thereof of the aforesaid 5 crates of lettuce and 5 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

Forty-third Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 13th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Schwartz Produce Co. of 5 crates of lettuce and 5 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Schwartz Produce Co. to purchase commodities, to wit, 5 baskets of peas at \$4.65 per basket and 20 boxes of honeydew melons at \$3.00 per [fol. 36] box as a condition of the sale to them and as an integral part thereof of the aforesaid 5 crates of lettuce and 5 crates of carrets; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

#### Forty-fourth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 15th day of September, 1944; at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street' in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Schwartz Produce Co. of 7 crates of lettuce and 5 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring said Schwartz Produce Co. to purchase commodities, to wit, 10 baskets of sweet potatoes at \$3 per basket and 5 boxes of Persian melons at \$3.09 per box as a condition of the sale to them and as an integral part thereof of the aforesaid 7 crates of lettuce and 5 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

# [fol. 37] Forty-fifth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 26th day of September, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Schwartz Produce Co. of 6 crates of

lettuce and 3 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Schwartz Produce Co. to purchase a commodity, to wit, 9 boxes of Persian melons at \$3.09 per box as a condition of the sale to them and as an integral part thereof of the aforesaid 6 crates of lettuce and 3 crates of carrots; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted as issued thereunder).

#### Forty-sixth Count

And the said United States Attorney in manner and form as aforesaid further respectfully/informs this Court:

That heretofore, to wit, on or about the 29th day of September, 1944, at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New [fol. 38] York, the defendant herein in connection with the sale by him on said date to Schwartz Produce Co. of 5 crates of lettuce and 5 crates of carrots, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Schwartz Produce Co. to purchase a commodity, to wit, 10 baskets of sweet potatoes at \$2.70 per basket as a condition of the sale to them and as an integral part thereof of the aforesaid 5 crates of lettuce and 5 crates of carrots, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 9th day of October, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro. having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Friedman Bros, of 5 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Friedman Bros. to purchase a commodity, to wit, 10 bags of onions at \$2.00 per bag as a condition of the sale [fol. 39] to them and as an integral part thereof of the aforesaid 5 crates of lettuce; again the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

# Forty-eighth Count

And the said United States Attorney in manner and form as aforesaid further respectfully informs this Court:

That heretofore, to wit, on or about the 13th day of October, 1944 at the Southern District of New York and within the jurisdiction of this Court, William Shapiro, having his principal place of business at 364 Washington Street, in the City, State and Southern District of New York, the defendant herein in connection with the sale by him on said date to Friedman Bros. of 6 crates of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 duly issued by the Price Administrator, unlawfully wilfully and knowingly evaded the provisions of the said Revised Maximum Price Regulation No. 426 by demanding, making and requiring the said Friedman Bros. to purchase a commodity, to wit, 15 bags of potatoes at \$3.25 per bag as a condition of the

sale to them and as an integral part thereof of the aforesaid 6 crates of lettuce; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders duly adopted and issued thereunder).

John F. X. McGohoy, United States Attorney.

[fol. 40] IN UNITED STATES DISTRICT COURT

(Title omitted)

NOTICE OF MOTION

SIR:

Please take notice that upon the annexed Plea in Bar of the defendant, William Shapiro, duly verified the 13th day of March, 1945, upon the exhibits annexed hereto and [fol. 41] upon the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a Term for Motions to be held at Room 318 of the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 19th day of March, 1945 at 10:30 in the forenoon of that day or as soon thereafter as counsel can be heard for an order sustaining the defendant's Plea in Bar and dismissing the respective counts of the respective information, as more specifically set forth in the annexed petition, and that the defendant, William Shapiro, be discharged with respect to the said counts, and for such other and further relief as may be just and proper in the premises.

Dated: New York, N. Y., March 13th, 1945.

Yours, etc., Curran & Stim, Attorneys for Defendant, William Shapiro, Office and P. O. Address, No. 29 Broadway, Borough of Manhattan, City of New York.

To: Hon. John F. X. McGohey, U. S. Attorney for the Southern District, District of New York, Attorney for the United States, U. S. Courthouse, Foley Square, New York City.

#### [fol. 42] IN UNITED STATES DISTRICT COURT

(Title omitted)

#### PETITION OF WILLIAM SHAPIBO

Comes now, William Shapiro, the defendant in each of the above entitled causes and Pleads in Bar to the respective informations in these causes and says:

- 1. That from September 11th, 1944 to September 20th, 1944, both inclusive, I was engaged as an individual in [fol. 43] the purchase and sale at wholesale of fruits and produce at 364 Washington Street, New York City, New York.
- 2. That on or about September 29th, 1944, there was left at my place of business a subpoena duces tecum and ad testificandum issued by Chester Bowles, Administrator of the Office of Price Administration, directing me to appear before John D. Masterton, Chief Enforcement Attorney, and Mortimer E. Greif, Enforcement Attorney of the Office of Price Administration of 350 Fifth Avenue, New York City, on the 2nd day of October, 1944, at 10 A. M., to testify concerning "all purchases and sales of fresh fruit and vegetables from September 1st, 1944 to September 28th, 1944" and requiring that I bring with me and produce at the said time and place "all duplicate sales invoices, sales books, ledgers, individual records, contracts and records relating to the sale of all commodities from September 1st, 1944 to September 28th, 1944. Exhibit A, which is annexed hereto and made part hereof, is a photostatic copy of the face of the said subpoena.
- 3. That prior to the return date of the said subpoena, by agreement between Mortimer E. Grief, Enforcement Attorney of the Office of Price Administration, and my then attorney, the return date was adjourned to the 4th day of October, 1944, at the same time and place. Annexed hereto and marked Exhibit B is a photostatic copy of the certificate of attendance signed by Mortimer E. Grief, Enforcement Attorney of the Office of Price Administration, certifying to my attendance as a witness at the time and place aforesaid, which certification appears on the reverse side of the said aforementioned subpoena.

- 4. That pursuant to the said subpoena I appeared at the Office of Price Administration on October 4th, 1944, [fol. 44] and after being duly sworn gave answer to certain questions put to me by Mortimer E. Grief, Enforcement Attorney of the said Office of Price Administration. A transcript of said testimony is annexed hereto and made part hereof, and marked Exhibit C.
- 5. That as appears from the said testimony, I claimed my privilege against self-incrimination under the provisions of the Emergency Price Control Act and correlated statutes, and of the provisions of the United States Constitution. That despite my claim of such privilege I was directed to turn over to the Office of Price Administration and to the said Enforcement Attorney my personal books and individual records consisting of my sales records. delivery receipts, invoices, accounts receivable ledger and cash book, for the period from September 1st, 1944 to September 28th, 1944. That pursuant to such direction I delivered the aforementioned records to the said Enforcement Attorney, as appears from the said aforementioned testimony (Exhibit C), and at the request of the said Enforcement Attorney said examination was adjourned to my place of business and continued there. There said submission of the aforementioned books and records was continued and completed at my place of business on October 6th, 1944, at which time and place the said records were actually examined by the Office of Price Administration.
- 6. That on the 20th day of December, 1944, three separate criminal informations containing 48, 3 and 3 counts respectively, were filed against me in the United States District Court for the Southern District of New York, bearing docket numbers C-119-147, C-119-143 and C-119-144 respectively. These respective informations will be sep-[fol. 45] arately treated as hereinafter indicated. Information No. C-119-147 is against me individually. Information No. C-119-143 is against me together with one Emanuel Lief. Information No. C-119-144 is against me and one Harry Simon.

7. (c) That counts 7 to 11 inclusive charge me with selling vegetables to Ernest Davino, Said Ernest Davino, together witth one Cezare Davino, are co-partners doing business at 154 West Avenue, Brooklyn, New York, under the firm name and style of Davino Bros. That the records of transactions between the said firm and myself are kept under the name of Davino Bros. That the said aforementioned counts charge me with selling vegetables in violation of Revised Maximum Price Regulation No. 426 issued by the Price Administrator, by requiring the said Ernest Davino to purchase certain commodities therein set forth as a condition of the sale to the said Ernest Davino of certain other commodities. That from the documents hereinbefore referred to and turned over to the Office of Price Administration pursuant to the subpoena, there was obtained and there appeared the name of the said Ernest Davino in several instances. That annexed hereto and made part hereof are photostatic copies of invoices which directly cover sales made to the said Ernest Davino and Davino Bros. during the month of September, 1944, and which invoices, together with the original sales tickets and delivery receipts covering the said sales were examined by the Office of Price Administration. The said documents are annexed hereto and marked Exhibits F-1 to F-7 inclusive.

[fol. 46] 10. That I produced the aforementioned documentary evidence before the Office of Price Administration and for and on account of which I became immune from prosecution. That each and every count hereinbefore specifically referred to in the said information is directly and indirectly referrable to the transactions contained in the aforementioned documentary evidence. That the Office of Price Administration used the evidence concerning the transactions respecting which I was immune from prosecution in obtaining the names and other leads and in preparing and searching out each and every evidence against me, and the United States Attorney in filing the information used the evidence so prepared and secured, as well as the leads therefrom. That all of such evidence was material and prejudicial to me.

Wherefore, I pray that each and every count of said information hereinbefore referred to be dismissed and that I be discharged hence.

Curren & Stim, Attorneys for Defendant, William Shapiro, Office and P. O. Address, No. 29 Broadway, Borough of Manhattan, New York City.

William Shapiro, Defendant in Person.

(Verified by William Shapiro, March 13, 1945.)

## [fol. 47] EXHIBIT A, ATTACHED TO PETITION

### OPA Form 2915-2

United States of America, Office of Price Administration Subpoena Duces Tecum

William Shapiro, 364 Washington St., New York City.

At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before John D. Masterton, Chief Enforcement Attorney and Mortimer E. Greif, Enforcement Attorney of the Office of Price Administration, at 350 Fifth Avenue in the City of New York on the 2nd day of October, 1944, at 10 o'clock A. M. of that day, to testify concerning all purchases and sales of fresh fruits and vegetables from September 1, 1944 to September 28, 1944 by William Shapiro

And you are hereby required to bring with you and pro-

duce at said time and place the following documents:

All duplicate sales invoices

sales books ledgers

inventory records

contracts and records

relating to the sale of all commodities from September 1, 1944 to September 28, 1944

Fail not at your peril?

In witness whereof, the undersigned, Price Administrator of the Office of Price Administration, has hereunto set his hand at New York, New York, this 28th day of September, 194-

Chester Bowles, Price Administrator.

Notice to Witness: If claim is made for witness fee or mileage, this subpoena should accompany voucher.

# [fol. 48] EXHIBIT B, ATTACHED TO PETITION

#### Return of Service

I certify the was duly ser	hat a duplicate original of the within subpoena
	erson named therein.
by leavin	ig the said original at the principal office or business of the person named therein, to wit,
at: on the	day of 194
	(Person making service), (Title).
. Chook me	thed med

Check method used.

## Certification of Attendance

I certify that the person named herein was in attendance as a witness at OPA—350 Fifth Avenue, N. Y. C. on (Date or dates of attendance) Oct. 4, 1944

Mortimer E. Greif (Person certifying), Enforcement Atty (Title).

examination to be continued

MEG

OPA Form 2015-2 Back.

# [fol. 49] Exhibit C, ATTACHED TO PETITION

Examination of books and records of William Shapiro pursuant to subpoena Duces Tecum issued September 28th, 1944 returnable October 2, 1944 and adjourned to October 4th, 1944.

William Shapiro, witness.

Henry Silverman, Esquire by David Siskind, Attorney for witness.

Mortimer E. Greif, Enforcement Attorney Office of Price Administration.

WILLIAM SHAPIRO, being duly sworn denoses and says:

Q. Mr. Shapiro, have you produced, pursuant to the subpoena Duces Tecum which was served upon you on or about September 28th, 1944, all the records mentioned thereon?

A. Yes.

Q. Will you please give them to me?

Mr. Siskind: Is the witness being granted immunity as to any and all matters for information obtained as a result of the investigation and examination of these records?

Mr. Greif: The witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to MPRs 271 and 426.

Mr. Siskind: Under those circumstances I believe that Mr. Shapiro would like to make a statement for the record.

Q. What is the statement?

A. (By Mr. Shapiro:) I wish to note that I am appearing [fol. 50] here as an unwilling witness pursuant to subpoena served upon me and that I claim my constitutional privilege. I do not waive immunity and specifically claim immunity. under the provisions of the Emergency Price Control Act of January 30, 1942, and particularly United States Code. title 50, section 922, as well as under the Compulsory Testimony Act of February 11, 1893 (United States Code 1934, title 49, section 46) and under the Constitution or any other applicable statute or provision or section of the United States Code or otherwise, as to any and all records produced or testimony given throughout this inquiry or investigation or any proceeding arising thereunder. Upon these conditions I have produced the records and documents called for in your subpoena addressed to me and dated September 28, 1944.

Q. I now direct you to produce the books and records as

required by the subpoena.

A! Here they are.

Q. Is there any objection to the continuation of this examination at your place of business as a matter of convenience with the same force and effect as though the examination were conducted here?

A. No.

## [fol. 51] EXHIBIT F-1, ATTACHED TO PETITION

Sep 8 1944

## Davino Bros.

WS 2 6 C Lopes 450 2700 2700\*

Stamped on face:—Paid Sep 8 1944 William Shapiro Inc.
Per 70 9/8

## EXHIBIT F-2, ATTACHED TO PETITION

Sep 15 1944

## Davino Bros.

WS 13 20 Grapes 2.85 57 00 57 00°

Stamped on face:—Paid Sep 22 1944 William Shapiro, Inc. Per 77 9/22

## EXHIBIT F-3, ATTACHED TO PETITION

Sep 22 1944

#### Davino Bros.

WS 20 10 Catawba 3 00 30 00 15 Sweets 3 00 45 00 WS 8 Lettuce 5 54 44 32 119 32\*

Stamped on face:—Paid Sep 29 1944 William Shapiro, Inc. Per 81 9-29

[6-1 50] TO	T 4 4			
[101. 52] E.	хнівіт F-4, Атта Davin	o Bros.	+	29 1944
HS 23		3.28	65 60 20 22 16 26 90	0 116 66*
Stamped on Inc. Per 8	face:—Paid O	ct. 6 1944	William	Shapiro,
Ex	нівіт Г-5, Атт	ACHED TO P	ETITION	
	Davin	o Bros.	. Sep 2	9 1944
WS 25	15 Persians 15 Grapes 10 Lettuce 15 Sweets 3 Carrots	3 00 2 85 5 54 3 00 5 38	45 00 42 75 55 40 45 00 16 14	204 29*
Stamped on f Per 86 10	ace:—Paid Oct	6 1944 Wil	liam Shar	oiro, Inc.
		· · · · ·		11.5
[fol. 53] E	хнівіт F-6, Атт	ACHED TO PE	TITION	
	DAVIN	o Bros	Sep 2	9 1944
WS 26	15 H Dews 15 Grapes	3 25 2 85		91 50*
Stamped on in Per 86 10	ace:—Paid Oct	6 1944 Wil	liam Shap	oiro, Inc.
Ex	нівіт F-7, Атт	ACHED TO P		+ 1
	DAVIN	o Bros	Sep 2	9 1944
WS 28	12 H Dews 10 Sweets 10 Lettuce	3 00 · 2 70 5 54	36 00 27 00 55 40	118 40*

Stamped on face:—Paid Oct 6 1944 William Shapiro, Inc. Per 86 10/6 [fol. 54]

#### IN UNITED STATES DISTRICT COURT

### U. S. vs. Shapiro

#### C-119-147

Memorandum Decision of Coxe, J., Denying Motion of Defendant by Means of Plea and Bar to Dismiss Information—Filed April 18, 1945

Motion of defendants denied for reasons stated in memorandum in three cases against Joseph Justman, et al. Nos. C 119-145, C 119-146 and C 119-148.

Dated April 17, 1945. See memorandum.

Alfred C. Coxe, J. D. C.

April 17, 1945.

### [File endorsement omitted]

[fol. 55] In District Court of the United States, Southern District of New York

### C. 119/147

Violation of U. S. C. Title 50 App. Secs. 901 et seq.

Tie in sale of produce in violation of OPA Regulation No. 426

United States of America,

VS.

## WILLIAM SHAPIRO

## JUDGMENT AND COMMITMENT

On this 18th day of December 1945, upon the proceedings heretofore had herein and on motion of the United States Attorney, it is by the Court

Ordered and adjudged that the defendant be fined \$1,000 on each of counts 7-8-9-10-11. Total fine \$5,000 to be paid within 10 days.

H. Church Ford, United States District Judge.

A true copy. Certified this 27th day of June 1946. George J. H. Follmer, Clerk. [fol. 56] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C. 119-143

UNITED STATES OF AMERICA,

VS.

WILLIAM SHAPIRO

### Bill of Exceptions

Before Hon. H. Church Ford, D. J., and a Jury.

New York, December 14, 1945.

#### APPEARANCES:

John F. X. McGohey, Esq., United States Attorney, for the Government; by Thomas F. Burchill, Jr., Esq., Assistant U. S. Attorney.

Curran & Stim, Esqs., Attorneys for Defendant Shapiro; Menahem Stim, Esq., of Counsel.

Mr. Stim: Your Honor, do I understand this case is being tried against William Shapiro or both defendants?

The Court: Only against William Shapiro.

Mr. Stim: That is right, and I am ready.

(A jury was duly impaneled and sworn.)

[fol. 57] (Mr. Burchill opened the case to the jury on behalf of the Government.)

(Mr. Stim opened the case to the jury on behalf of the defendant Shapiro.)

New York, December 17, 1945, 10:30 A. M.

Trial resumed.

ERNEST D'Avino, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

# By Mr. Burchill:

Q. Mr. D'Avino, what is your occupation?

A. Wholesale fruits and produce.

Q. How long have you been in that business?

A. About 22 years.

Q. And where is your place of business?

A. Brooklyn Terminal Market.

Q. That is located in Brooklyn?

A. Yes, sir.

Q. Do you know William Shapiro?

A. Yes, sir.

Q. Do you see him in the courtroom?

A. Yes, sir.

Q. Will you point him out, please?

A. This man here.

Q. The second man at the counsel table?

A. Yes, sir.

Mr. Burchill: Will your Honor direct the stenographer to note on the record that the witness has identified the defendant?

The Court: Yes.

Q. How long have you known Mr. Shapiro?

A. Since I am in business.

[fol. 58] Q. Did you have a transaction with Mr. Shapiro in August, 1943?

A. Yes, sir.

Q. Do you remember the date of that transaction?

A. Not exactly.

The Court: In connection with which count are you bringing out this testimony?

Mr. Burchill: In connection with counts 7, 8, 9, 10 and 11. Will you mark this for identification, please.

(Marked Government's Exhibit 12 for identification.)

Q: I show you this paper and ask you whether or not that refreshes your recollection as to the date of the transaction?

- A. Yes, sir.
- Q. Pardon met
- A. Yes, sir.
- Q. Will you please tell this Coprt and jury what was the date of the transaction?
  - A. August 20, 1943.
  - Q. August 20, 1943†
  - A. Yes, sir.
- Q. Did you have a conversation with Mr. William Shapiro on that day?
  - A. Yes, sir.
  - Q. What did he say to you and what did you say to him?
- A. I went there to purchase lettuce and Mr. Shapiro says, "If you want lettuce, you must buy Idaho potatoes and peas."
  - Q. And what?
  - A. Peas.
  - Q. What did you say?
  - A. Well, I needed the stuff, and I got to take it.

Mr. Stim: I object to the answer—let us get the answer, what he said, not that "I got to take it." That is not conversation.

[fol. 59] The Court: I assume that is what he told him.

Mr. Stim: He is asked "What did you say to him?"

The Court: His answer is what he meant to say, is that what you meant to tell him?

The Witness: Yes, sir. .

The Court: I assume he is answering what he told him.

Q. What did you buy on that date?

A. I was supposed to buy ten lettuce.

Mr. Stim: I object to what he was supposed to buy. He was asked what did he buy on that date.

The Court: What did you buy?
The Witness: I bought ten lettuce.

- Q. And what else?
- A. And I got ten potatoes and ten peas with them.
- Q. Did you want the peas?

Mr. Stim: I object to that.

The Court: Overruled. Mr. Stim: Exception.

A. No, sir.

Q. What quantity of potatoes did you buy?

A. Ten hundred-bags of Idaho potatoes.

Q. Did you have another transaction with Mr. Shapiro in that month?

A. The same month?

Q. Yes.

A. I guess I'did.

Q. Do you remember whether you did or not?

A. Not exactly.

Q. I show you Government's Exhibit 13 for identification and ask you whether or not that refreshes your recollection [fol. 60] as to whether or not you had another transaction?

A. Yes, sir.

Q. What was the date of that transaction?

A. August 28, 1943.

Q. Did you have a conversation with William Shapiro on that date?

A. Yes, sir.

Q. What did he say to you and what did you say to him?

A. I asked him for lettuce.

Q. What did he say?

A. He said "You got to buy peas with lettuce."

Q. Was there anything else said?

A. That is all.

Q. What did you buy on that day?

A. I bought seven lettuce and five carrots and ten peas.

Q. Did you want the peast

A. No, sir.

Q. Did you have another transaction with Mr. Shapiro shortly after that?

A. I guess I did.

Q. Do you remember the exact date?

A. No.

Q. I show you Government's Exhibit 14 for identification and ask you whether or not that refreshes your recollection as to the date of the transaction?

A. Yes, sir, August 30, 1943.

Q. Did you have a conversation with William Shapiro on that date?

A. Yes, sir.

Q. What was the conversation on that date?

A. I asked him for lettuce.

Q. What did he say to you and what did you say to him?

A. He said, "You better take peas with it."

Q. What did you buy on that date?

A. I was supposed to get three lettuce and I only got two' that day.

Mr. Stim: I object to that. He asked him what did he buy on that date.

The Witness: I bought two lettuce and seven peas.

Q. Did you want the peas?

A. No, sir.

[fol. 61] Q. Did you have another transaction with Mr. Shapiro shortly after that?

A. Yes, sir.

Q. Do you remember the date!

A. No, sir.

Q. I show you Government's Exhibit 15 for identification and ask you whether or not that refreshes your recollection as to the date of the transaction?

A. Yes, sir.

Q. What is the date of that transaction?

A. September 10,/1943.

Q. And did you have a conversation with William Shapiro on that day?

A. Yes, sir.

- Q. What did you say to him and what did he say to you!
- A. I wanted to buy lettuce and he said, "You have got to take Persian melons with it."

Q. And what did you buy on that day?

A. Six lettuce and ten Persian melon.

Q. Do you mean ten crates?

A. Ten crates of Persian melon.

Q. And did you want the melons?

A. No, sir.

Q. Did you have a subsequent transaction with Mr. Shapiro?

A. In what?

Q. Did you have another transaction shortly after that with Mr. Shapiro?

A. Yes.

Q. Do you remember the exact date of it!

A. No, sir.

Q. I show you Government's Exhibit 16 for identification and ask you whether or not that refreshes your recollection as to the date of the subsequent transaction?

A. Yes, sir.

Q. What is the date, please?

A. November 19, 1943.

Q. Did you have a conversation with William Shapiro on that date?

A. Yes, sir.

Q. What was the conversation?

A. I asked him for lettuce and carrots.

Q. And what did he say?

A. You got to take celery with it. [fol. 62] Q. Did you want the celery?

A. No.

Q. What did you buy on that day?

A. I bought five lettuce, two carrots, and ten celery.

Mr. Burchill: I offer these in evidence.

Mr. Stim: No objection.

Mr. Burchill: No further questions of this witness. You may inquire.

(Government's Exhibits 12 to 16 for identification marked in evidence.)

#### Cross-examination.

#### Mr. Stim:

Q. You do not handle lettuce and corrots only?

A. No.

Q. You handle all kinds of commodities?

A. Yes.

Q. Of course, when you wanted lettuce and carrots, you could have made a bigger profit if you only handled the scarce article?

A. How can we when we got to sell at ceiling?

Q. You bought them at ceiling?

A. Certainly.

Q. When you bought the first purchase of ten bags of potatoes, August 20th, you made a profit when you sold them, didn't-you?

A. Yes.

Q. You made a profit on the potatoes?

A. Yes.

Q. When you bought the celery or lettuce, or you came to buy the celery and lettuce from Mr. Shapiro, these other commodities were available for sale in the other merchants' stores? You could have gone to any other merchant but Shapiro?

A. Sure.

Q. You bought from Shapiro quite a number of years, didn't you?

A. Yes, sir.

Q. And you bought other days than the days you testified to between August and November of that year 1943?

A. Well, I don't recall:

[fol. 63] Q. Well, in between August 20, 1943, and November, 1943, you bough in between then, didn't you?

A. Sometimes I did.

Q. This is not the only transaction that you had with Shapiro during that period from August until November? Do you understand what I mean?

A. (No response.)

Q. You were asked about four or five transactions. Now, you had other transactions in between August and November with Shapiro?

A. I don't recall. Maybe I did.

Q. And you are still buying from him today?

A. Certainly.

Mr. Stim: Will your Honor indulge me for a minute.

(Counsel examines papers.)

Q. Now, when you were buying a scarce article, such as lettuce and carrots, and you also have in your place potatoes and others, you try to sell them, don't you?

A. Surely.

Q. When you bought this merchandise from Mr. Shapiro, who picked the merchandise up?

A. My truckman.

Q. Your truckman?

A. Yes.

Q. I show you this paper and I ask you whether this is the sold ticket of the merchandise which you bought on August 28th?

Mr. Burchill: For which ticket?

Mr. Stim: The "sold" ticket.

A. Yes.

Mr. Stim: I would like to have it marked for identification.

(Marked Defendant's Exhibit A for identification.)

[fol. 64] Q. I show you this sold ticket and I ask you whether this is the sold ticket of your purchase of September 10th, ten Persians and six lettuce?

A. Ten crates of Persian melons and six iceberg lettuce.

(Marked Defendant's Exhibit B for identification.)

Q. Now, Mr. D'Avino how soon after the merchandise was picked up by your chauffeur or truckman did you receive a bill from Mr. Shapiro?

A. Well, maybe two days later.

Q. Later?

A. Yes.

Q. And how soon did you pay for it?

A. We pay once a week.

Q. I mean within about a week?

A. Within a week.

Q. You were not requested to pay cash?

A. No.

Q. You paid by check in the regular course of business?

A. Yes.

Q. And that is how you did business with him for a number of years?

A. Yes.

Q. Were you at liberty to return any of the merchandise if you wanted to?

A. Surely.

Mr. Stim: That is all.

Mr. Burchill: That is all.

[fol. 65] JOSEPH H. BAKER, called as a witness on behalf of the defendant being first duly sworn, testified as follows:

Direct examination.

#### By Mr. Stim:

Q. Mr. Baker, you came here especially to testify in behalf of the defendant William Shapiro, is that right?

A. That is right.

Q. And where do you live!

A. Norfolk, Virginia.

Q. What is your occupation?

A. I am in the wholesale produce business. My business is mainly growing and shipping produce and green vegetables.

Q. How long have you known the defendant Shapiro?

A. About six years?

Q. During that time did you do business with him?

A. Continuously.

Q. Do you know other people in your community who know him?

A. I didn't get the question.

Q. Do you know other merchants in your community

who know Mr. Shapiro?

A. Numerous people in that section of the country and in other sections of the United States with whom I have talked from time to time.

Q. Just a moment. Did you have occasion to discuss with these people the defendant William Shapiro's reputation

for honesty, integrity, and truth-telling?

A. I have discussed it with other growers and shippers in all sections in my community and in numerous sections of the United States, and they hold him in the same high regard-

Q. Just a minute. I want to ask you a question as

to his reputation.

A. His reputation for truthfulness and for reliability and for trustworthiness is above reproach.

Mr. Stim: That is all.

Mr. Burchill: No questions.

[fol. 66] W. C. Jacob, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stim:

Q. Mr. Jacob, where do you live?

A. Onley, Virginia.

Q. What is your occupation?

A. I am in the produce business, grower and shipper.

Q. You grow the products?

A. Yes, sir.

Q. Did you come here especially from your home out in Virginia, to testify for William Shapiro?

A. That is right.

Q. How long have you been doing business with Shapiro?

A. About fifteen years.

Q. During that time did you have occasion to discuss with other men in your community Mr. Shapiro's reputation for honesty, integrity and truth-telling?

A. Yes, in a general way I did.

Q. And what is that reputation?

A. Very good. I consider him absolutely honest in all his dealings.

Mr. Stim: Thank you.

Mr. Burchill No questions.

(Short recess.)

[fol. 67] FRANK M. MITCHELL, called as a witness by the defendant, being duly sworn, testified as follows:

Direct examination,

By Mr. Stim:

Q. Mr. Mitchell, where do you live?

A. Ridgewood, New Jersey.

Q. And what business are you in?

A. We are in the mercantile credit agency business.

Q. Is that connected with the produce industry?

A. We rate them financially and morally, each firm.

- Q. All over the United States?
- A. And Canada.
- Q. In connection with rating these merchants, do you inquire into their background financially as well as morally?
  A. Yes.
- Q. And do you inquire whether or not they comply with regulations of the Government, OPA, and so forth?

Mr. Burchill: If your Honor please, I understand this man to be a character witness. He can testify as to whether the defendant's character is good or bad, and that is the extent of his testimony.

Mr. Stim: I want to show the background.

The Court: I think you are entitled to show it.

Q: What is your answer?

A. What is the question?

(Question read.)

A. Yes, as part of the investigation.

Q. And as part of this investigation did you so inquire into the character and reputation of the defendant William Shapiro?

A. In the course of years, yes, sir.

Q. And did you have any opportunity to discuss with other people Mr. Shapiro's reputation for honesty, truth-[fol. 68] fulness, and compliance with Government regulations, and obedience to the law?

A. Yes, sir.

Q. And what is that reputation?

A. Excellent.

Mr. Burchill: No questions.

The Court: Well, all right, call your next witness.

CLARENCE M. FREY, a witness called by the defendant, being duly sworn, testified as follows:

Direct examination.

# By Mr. Stim:

Q. Mr. Frey, where do you reside?

A. North Bergen, New Jersey.

Q. And what is your business?

A. I am the perishable traffic district manager of the Missouri-Pacific Lines Railroad.

Q. How long have you known the defendant?

A. About twenty years.

Q. And do you know other men in the community who know him?

A. I do.

Q. And did you ever have any opportunity to discuss with these men the defendant's reputation for honesty, truthfulness, and integrity?

A. I have.

Q. And what is that reputation?

A. Excellent.

Mr. Stim: Thank you.

Cross-examination.

## By Mr. Burchill;

Q. You say you discussed his reputation with other men in the community. In what community did you discuss it? [fol. 69] A. Our little produce community down in Washington Street.

Q. Did you ever discuss his reputation with the whole-salers?

A. Yes, sir.

Q. And with the receivers?

A. Wholesalers and receivers are one and the same, sir.

Q. Well, are you sure of that?

A. Yes, sir.

Q. What is Mr. Shapiro?

A. A receiver and a wholesaler.

Mr. Burchill: I see. That is all.

Mr. Stim: That is all.

The Court: Ladies and gentlemen of the jury, during the recess of the court do not discuss this case among yourselves and do not permit anybody to discuss it with you. Do not make up your mind about it until it is finally submitted to you.

Recess until 2:15.

(Recess taken until 2:15 P. M.)

#### AFTERNOON SESSION

#### Motions to Dismiss

(The following occurred in chambers, out of the hearing and presence of the jury):

Mr. Stim: I move to dismiss count No. 1 in information C-119-143 on the ground there is insufficient evidence, and that the Government failed to prove a prima facie case.

The Court: Let the motion be sustained.

As to count No. 3.

Mr. Stim: Of the same information, I move to dismiss on the same grounds, that is Meines.

[fol. 70] The Court: I haven't checked Meines.

Mr. Stim: You have the same situation.

The Court: Sustained as to that.

Mr. Stim: That disposes of the small information.

The Court: Yes, that disposes of the small information. Now, as to the large information beginning with count 1.

Mr. Stim: There, your Honor, I move to dismiss that count on the ground if your Honor will see in the testimony he says he spoke to Emanuel Leef who—

The Court: As to count 1 this man details his conversa-

tion with the man Shapiro.

Mr. Stim: Well, all he asked was "What else do you want?"

The Court: He said "You got to buy something else."

Mr. Stim: Did he speak to Shapiro?

The Court: That is on page 7. Overruled as to count No. 1.

Mr. Stim: Exception.

The Court: No. 2 is page 12 and 13. Are they with Leef? That is where Mr. Simon asked him directly. I am going to leave that in.

Mr. Stim: I respectfully except.

The Court: You are allowed your exception.

Mr. Stim: I move as to 3 in connection with Deroshinsky on the same ground.

The Court: Overruled.

Mr. Stim: I move as to 7, 8, 9, 10, and 11 of D'Avino, your Honor will see he stated "What else?" He said, [fol. 71] "I took some onions and some other thing."

The Court: He made it pretty clear.

Mr. Stim: If your Honor will look at it you will see-

The Court: That is not here yet.

Mr. Stim: I am pretty sure he said "What else?"

The Court: Here is what D'Avino said.

Mr. Burchill: That was the first witness this morning.

The Court: This man testified as to count 3 of this large indictment.

Mr. Stim: Yes. We disposed of that. I am sure he said "What else do you want?"

The Court: All right, D'Avino. I will have to overrule as to that.

Mr. Stim: Exception.

The Court: And now 36 and 37. I have not found anything.

Mr. Stim: You have the testimony there.

The Court: Yes, and I looked through my memorandum here. All he said was that the fellow tried to make a sale.

Mr. Stim: Your Honor even asked him.

The Court: Yes, I asked him "Was he just trying to sell you some stuff?" I think I will sustain it as to 36 and 37.

Mr. Stim: Very well. Martori-

The Court: Martori I think is so vague that I can't accept it.

Mr. Stim: I move to dismiss 39, 40 and 41.

The Court: Sustained. That brings us down to 42, 43, 44 and 46.

[fol. 72] Mr. Stim: If your Honor will look at Bentivenga's testimony, I studied it here.

(Discussion off the record.)

The Court: I overrule your motion as to count 42.

Mr. Stim: Exception.

The Court: Now we come to count 43.

(Discussion off the record.)

The Court: Overruled. Mr. Stim: Exception.

The Court: Count 44.

(Discussion off the record.)

The Court: Overruled.

Mr. Stim: Exception.

The Court: Count 46.

(Discussion off the record.)

The Court: Well, he said the same as in the other instance, so I will overrule it.

Mr. Stim: Exception.

Mr. Burchill: And then as to count 48 the Government

moves on the ground that the witness is unavailable.

The Court: So we have to submit to the jury under information No. 147 the charges set out in counts 1, 2, 3, 7, 8, 9 10, 11, 42, 43, 44, and 46. Am I correct?

Mr. Burchill: That is right. Mr. Stim: Twelve counts.

Mr. Burchill: Dismissing 1 and 3 of the small information, and 36, 37, 39, 40, and 41 of information 147.

The Court: That is right. Mr. Stim: As well as 48.

The Court: Yes, that is dismissed on motion.

[fol. 73] Mr. Stim: At this time I renew my motion, which I made before the Honorable Judge Coxe, because under

the rules I had to make that motion before trial.

That motion dealt with my contention that the information should be dismissed on the ground that when the defendant was subpoenaed to produce his records and books, and he did so produce those books, but at that time claimed immunity under the provisions of the Compulsory Testimony Act of February 11, 1893, as well as under that particular immunity clause which is incorporated in the Emergency Price Control Act of January 30, 1942. He obtained immunity by affirmatively asserting immunity.

The Court: My information from you is that the question was presented to Judge Coxe, and he denied your motion. I shall not review his action in that case. In conformity with the ruling made by Judge Coxe I will overrule your motion

and give you an exception.

Mr. Stim: Shall it be considered for the purpose of this motion that all the papers that were presented to Judge Coxe shall be deemed to be part of the record in this case?

The Court: Yes, I think that is proper.

Mr. Stim: I also would like to renew the motion which I made before Judge Caffey in which I asked Judge Caffey for permission to file a protest with the Emergency Court of Appeals, against the validity of Regulation \$26, subdivision 11, the same regulation with the violations of which the defendants are herewith charged.

[fol. 74] Judge Caffey denied my application, and I re-

new it merely for the purpose of the record.

The Court: All right, motion overruled.

Mr. Stim: I assume in the same way the record which was presented to Judge Caffey shall be deemed part of the record on this motion here.

The Court: It is already a part of the record.

Mr. Stim: I now move to dismiss the entire information C-119-147 on the ground that the information does not charge the defendant with the violation of the Emergency Price Control Act as passed by Congress. The evidence is clear that there is no contention made by the Government that the defendant did charge over-ceiling prices or did anything in conjunction with violating that particular law, and in view of the fact of that evidence I contend no crime was committed, and I move to dismiss the information on that ground.

The Court: Motion overruled. Exception to you.

Mr. Stim: Exception.

The Court: While we are here why don't you make

up your record as to the stipulation?

Mr. Stim: Yes, I would like under part of the defense to offer in evidence through the testimony of several merchants who are of long standing in the industry, and who have been in the industry for about a period of 20 years—

Mr. Burchill: Have you a list of them?

Mr. Stim: I will give you them: Fred Vahlsing, W. C. Deyo, Michael Kodish, Thomas F. Cochran—who will testify that long before the office of Price Administration there was a custom in the industry that in order to move—that in order [fol. 75] to do business along economic methods, and to enable the merchant to move his merchandise and spread the delivery of all commodities to the public, it was generally a custom that such merchants in this industry, in the wholesale produce industry, when selling scarce commodities, to also require, by ordinary business persuasion, to have these buyers purchase at the same time plentiful commodities.

These witnesses will further testify that the wholesalers and the receivers, such as William Shapiro, the defendant herein, in the course of their business were required as a matter of custom, when they were buying merchandise from shippers and growers, to acquire their merchandise the same way. They would obtain a cargo of scarce merchandise, but at the same time they would be required, by ordinary business persuasion, to acquire a carload or carloads of plentiful merchandise. That the methods which were used were in the custom and practice of the business of the produce industry before the Office of Price Administration. It is the same method which is being used today. That the industry has repeatedly required and requested that the Administrator hold hearings and find as a fact whether or not that particular method and custom and practice is in violation of the law, but that the Administrator at no time consented to hold such hearings.

They will further testify that a protest was filed with

the Office of Price Administration requesting the

Mr. Burchill: Can you give us the approximate time? [fol. 76] Mr. Stim: March 16, 1945—requesting that he issue subpoenas for the purpose of getting evidence and establishing the custom and practice, but that the Administrator refused to do so by an order dated April 20, 1945. I would like to offer the order in evidence, your Honor.

Mr. Burchill: I object to it. I think I object to the whole line of testimony. It is not competent or relevant in this case as to whether or not Shapiro sold the articles in con-

nection with other commodities.

The Court: My judgment is that none of the evidence which you have stated and offered is relevant or competent on the issue here as to whether or not the defendant made these sales for the purpose of evading the Price Control Act by securing an advantage beyond the prices fixed for the scarce commodities through forcing into the transaction commodities which were plentiful and which were not quite so salable. My judgment is your tender or offer of the testimony should be denied, and the objection offered by the Government sustained, to which you are allowed an exception, and your statement of what you propose to prove may be made a part of the record for that purpose.

Mr. Stim: May that be marked for identification?

The Court: Yes.

(Marked Defendant's Exhibit D for identification.)

Mr. Stim: May I make a further motion? I move to dismiss further on the ground that the Government failed to prove the regulation.

[fol. 77] The Court: Overruled. We take judicial notice

of the regulations.

Mr. Stim: By "regulation" I refer to Regulation 426, subdivision 11.

(The clerk entered the court's chambers.)

The Court: Mr. Clerk, I sustain motions to dismiss as to certain of these counts.

(Discussion off the record.)

The Court: I will tell the jury that I am submitting only these specific counts and they will disregard all the counts except these particular counts.

Mr. Stim: Will you agree, Mr. Burchill, to have the separate counts before the jury incorporated individually?

The Court: When the jury retires it seems to be your custom, Mr. Burchill, to let them have a copy of the information. I suppose the clerk has a copy that he has available.

The Clerk: Usually we pass them the original with the back off.

The Court: I think it is fair because the jury may be confused if we pass in all these counts. I would like them to have a copy of the information with the counts embraced in it only which are being submitted. Can that be arranged?

Mr. Burchill: The copy that I have has some notation on it.

The Court: Let us get it straightened out.

(The following occurred in the court room in the presence and hearing of the jury.)

The Court: Ladies and gentlemen of the jury, the Court has found the evidence insufficient to support the charges [fol. 78] in reference to certain of the counts that have been under inquiry. I have sustained the defendant's motion to dismiss counts 1 and 3 of information 143. That eliminates that information from the case.

I have sustained the defendant's motion to dismiss for lack of evidence to support it, the charges set out in counts 36, 37, 39, 40 and 41 of information 147. I have sustained those motions upon the ground that the evidence is not sufficient to sustain the charges set out in those counts of the information, so they are dismissed and will be ignored by the jury. That leaves us here for trial on the ultimate question, counts 1, 2, 3, 7, 8, 9, 10, 11, 42, 43, 44 and 46 of information No. 147, and the testimony will be directed as to those counts only for your consideration on the question of guilt or innocence on those counts in information 147.

Mr. Stim: Will your Honor also tell the jury on the motion

of the United States Atorney as to count No. 48.

The Court: Yes count 48 was dismissed by the District Attorney, the statement being that the witness was not available to support that count, and his motion for dismissal was sustained.

JOHN R. WOOD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

# By Mr. Stim:

Q. Mr. Wood, where do you reside?

A. 2 Vesper Place, Bloomfield, New Jersey.

Q. What is your occupation?

A. Banking.

[fol. 79] Q. What bank are you connected with?

A. The Corn Exchange Bank Trust Company, New York City.

Q. Do you know the defendant Shapiro?

A. I do.

Q. How long have you known him?

A. Oh, for fifteen to twenty years.

Q. Do you know other men in the community who know him?

A. Yes.

Q. Did you ever have any discussion about his reputation for honesty, truth-telling and integrity among them?

A. No, sir.

The Court: He said he hasn't had an opportunity to discuss it.

Q. Did you ever discuss with them-

A. I never had occasion to.

The Court: He asked whether you ever had an opportunity to discuss it with other people.

The Witness: No, sir.

The Court: He said he has not.

Q. Do you kown what his reputation is for honesty, truth telling and integrity?

The Court: How would he know if he hasn't discussed it? I don't think he is qualified to answer that.

Q. Did anyone in the community ever speak to you about Shapiro's reputation for honesty, truth telling and integrity?

A. Did anyone speak to me about it?

Q. Yes.

A. I had lots of people that I met that know Mr. Shapiro. [fol. 80]. Q. And what did they tell you.

The Court: Wait a minute. You haven't answered the question. He asked you if anybody ever spoke to you about Mr. Shapiro's honesty, integrity and truth telling.

The Witness: No, sir.

Q. During the fifteen year or twenty years that you have known him, did you have any occasion at all to find any act that he has done, as far as you know, that is dishonest or improper?

Mr. Burchill: I object to that.

The Court: Sustained.

Mr. Burchill: I object. The witness is not qualified to answer that.

The Court: Gentlemen, step up here and let me discuss this.

(Colloquy between Court and counsel at the bench.)

The Witness: Maybe I misunderstood his question.

Q. Did you have any occasion to discuss or have anybody talk to you about Mr. Shapiro's reputation for honesty and integrity and truth telling?

The Court: He has already answered that. I think he has said twice that nobody has talked with him about it.

## By the Court:

Q. Did you discuss it with people—

A. When we make a loan to people—
[fol. 81] Q. I am not asking anything about a loan but have you discussed with people the honesty and integrity and truth telling of the defendant?

A. Yes, people throughout the market, I have known lots of people that I have spoken with about Mr. Shapiro.

The Court: We had a lot of trouble finding that out. He seems to have qualified himself now.

By Mr. Stim:

Q. As a result of hearing people in the market talk about Mr. Shapiro, what is his reputation for truth telling, honesty and integrity?

A. Good.

Mr. Stim: That is all.

Mr. Burchill: No questions.

FRED H. VAHLSING, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

## By Mr. Stim:

Q. Mr. Vahlsing, where do you reside?

A. South Orange, New Jersey.

Q. What business are you in?

A. Principally grower and shipper of vegetables.

Q. Are you also in the produce business in New York City?

A. Yes, we have a shop in New York City.

Q. What is the amount of business that you do approximately?

A. Last year we did about seventeen million dollars.

Mr. Burchill: I don't see the relevancy about how much business he does.

[fol. 82] The Court: Probably there is some relevancy as to his acquaintanceship and the extent of his acquaintance in New York that he wishes to develop.

Mr. Burchill: If your Honor please, it is relevant-

The Court: Oh, yes.

Q. Do you know the defendant Willia Shapiro?

A. I do.

Q. How long have you known him?

A. At least twenty years or more.

Q. And during that time did you have any occasion to discuss with other people in the trade or in the com-

munity the defendant Shapiro's reputation for honesty, truth telling and integrity?

A. No, I didn't discuss that but if you asked me-

The Court: That is all he asked you and you need not fix up a question to ask yourself.

Mr. Burchill: I submit the witness is not qualified.

Q. Did you hear anybody in the community talk about Shapiro's reputation for integrity, honesty and truth telling?

A. Oh, yes, I heard that mentioned in the trade.

Q. What is that reputation?

A. Mr. Shapiro's reputation in the trade is very good, and I should say excellent.

Mr. Stim: That is all.

Cross-examination.

By Mr. Burchill:

Q. Is your line of business on the same level as Mr. Shapiro's?

A. Well, there is a little difference there.

[fol. 83] Q. Do you sell to some of the people that he sells

A. Yes.

Q. Or that your firm sells to?

A. Yes.

Mr. Burchill: That is all.

WILIAM SHAPIBO, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stim:

Q. Mr. Shapiro, how old are you?

A. Forty-eight.

Q. Where do you reside?

A. 3595 Bedford Avenue.

Q. Brooklynt

A. Brooklyn.

Q. And are you married?

A. Yes, sir.

Q. You live with your wife and your family there?

A. Yes, sir.

Q. What business are you in?

A. Wholesale fruit and produce.

Q. How long have you been in that business?

A. 28 years.

Q. And where are you now located?

A. 364 Washington Street, New York.

Q. Have you ever been convicted of a crime?

A. No, sir.

Q. What is the type of your business?

A. Wholesale fruit and vegetable.

Q. What kind of commodities do you handle?

A. Practically everything in the fruit and vegetable line.

Q. Will you tell us what was your total amount of business sales made by your firm during the period from the latter part of 1943 and through the year 1944, approximately—I mean during the period, approximately. You [fol. 84] don't have to give it in exact figures.

A. \$1,800,000, I think.

Q. Will you tell us what was the net profit on that \$1,800,000 before considering your income tax payment or any salary you drew from the business?

A. A loss of-

Mr. Burchilk: Just arminute, I object.

The Court: On what theory do you contend that that is material?

Mr. Stim: I want to show that there isn't any enrichment.

The Court: Never mind what you want to show. How do you think that is material? How do you regard that as relevant to this issue?

Mr. Stim: They raised the question or the impression has been given to the jury that it was a question of his enrichment and I want to show that on a business of close to two million dollars what his profit or loss was.

The Court: I sustain the objection.

Mr. Stim: Exception

Mr. Burchill, At this point, will your Honor direct the witness when I rise at the end of a question, that the witness withhold his answer.

The Court: You understand that, don't you?

The Witness: Yes, sir.

Q. Mr. Shapiro, are there times in the year when certain commodities that you handle are scarce and others are plentiful at the same time?

A. Yes, sir.

Q. What is your method of selling these commodities to the wholesaler; do you give everyone all that they want?

A. No, sir, it cannot be done.

[fol. 85] Q. What do you do?

A. I try to give everybody as much as I possibly can in a fair way. I try to ration everything to everybody in a fair and equitable way.

Q. Do these merchants who come to buy from you generally or always want a scarce article alone on which they can make a big profit?

Mr. Burchill: If your Honor please, I object to that.

The Court: I sustain the objection. You are putting words in the witness's mouth.

Q. Tell us what is the method of your doing business in such a situation?

A. Well, if we have something that is very scarce, we try to give it to all of our trade and I try to ration it in proportion the best way I know how to see that everybody get a fair and equal deal.

Q. When a man comes into your place of business who does he generally do business with if he wants to buy something?

A. Either myself or a salesman.

Q. When you say either yourself or your salesman, what

do you mean by that?

A. Well, if I am there and I am not busy, he will come over to me. If I am busy, he may come to the salesman; it all depends who is not busy.

Q. What happens if he comes to you or one of your salesmen who handles the transaction?

A. If he comes to me, I do; if he comes to the salesman, the salesman does it.

Q. Does it ever happen that one or the other, either you or the salesman who has charge of the transaction, transfers the transaction or has someone else conclude it?

A. No, sir, never.

[fol. 86] Q. What is the first thing that is done when a business man comes in to your place when he selects a certain product?

A. We make out a sales ticket. There is my sales book

there, Mr. Stim.

Q. I show you Defendant's Exhibit A for identification and ask you to tell the jury what happens when he comes in, how is it made out?

A. I have the salesbook over there.

Q. I will withdraw that receipt. What happens.

A. When the man comes over, I always put his name and commodity down here.

Q. When you say down here, what do you mean?

A. On the sales ticket. It is a duplicate of the sold card. I make it out in duplicate.

Q. Is that the same thing as Defendant's Exhibit A for identification?

A. Yes, sir.

Q. All right, let'us go to this, because I have a reason for that. Who, as a rule, makes out the sales tickets on the sold cards?

A. The salesman.

Q. When you say the salesman, whom do you mean?

A. The man who does the business with the man that buys.

Q. Can you from that particular sales ticket, Defendant's Exhibit A, tell who made out the particular sale at that time?

A. Yes, sir.

Q. During 1943, December 28, 1943, who were the salesmen in the place in addition to yourself?

A. Harry Simon and Mannie Leef and myself.

Q. What does that indicate?

A. D'Avino Bros., 10 peas, 5 carrots and 7 lettuce.

Q. You made the sale?

A. Yes, sir.

Mr. Stim: I offer it in evidence.

Mr. Burchill: I don't see the relevancy of this, your

[fol. 87] Mr. Stim: Your Honor, we will come to the relevancy in a moment.

The Court: He may have some purpose.

Mr. Stim: I have a purpose.

Mr. Burchill: Could it be received subject to connection?
The Court: It is his record of that particular sale about which you introduced the bill. There may be some comparison he wants to make.

(Marked Defendant's Exhibit A in evidence.)

Q. I notice certain figures on it, certain numerals alongside the product; what do these numerals indicate?

A. That represents the car number.

Q. What do you mean by the car number?

A. Where the merchandise came from.

Q. Are you able from such a record as Defendant's Exhibit A, to trace what particular carload that merchandise came from?

A. Yes:

Q. Will you tell us whether there is any regulation which requires you on these original transactions such as Exhibit A to have such a record?

A. The Department of Agriculture

The Court: What materiality has that to this issuef

Mr. Stim: I will come to it, your Honor.

The Court: Step up here, gentlemen, I want to know just where we stand.

(Colloquy at the bench between Court and counsel.)

Q. What is the car number?

A. 18612 on the peas.

Q. What is the price that you charged?

A. \$3.50.

[fol. 88] Q. Did you on the same date sell a much greater quantity of peas to the United States Army!

Mr. Burchill: I object to the question.

The Court: Sustained.

Q. Did you at any time charge any customer when you sold them a plentiful article, together with a scarce article, demand any greater price than what you charged to others who bought only the plentiful article?

Mr. Burchill: I object to the question.

The Court: There is no such claim made here, so there is no use adducing proof on something that is not contended. He is not charged with making a charge in excess of the ceiling price on the transaction.

Q. You had salesmen, you say?

A. Yes.

Q. What instructions did you give to any salesmen who worked for you?

The Court: Wait just a minute. I eliminated every count that involved his salesmen, didn't It

Mr. Stim: That is right, your Honor.

The Court: Then what Materiality has that question?

Q. The commodities that you sell, what is the length of time that is required by you to sell these commodities be-

fore they become a loss to you?

A. I usually try to sell all the merchandise we have from four to six hours. We start to work generally about twelve o'clock at night and we try our best to be seld out by three or [fol. 89] four in the morning. If we are not sold out by that time, we are pretty well stuck, so we have between four or five hours to sell all our merchandise. We have got to move it.

Q. Are there any refrigerating facilities to put any of the merchandise in?

A. None.

Q. Now, Mr. Shapiro, the sale that Mr. D'Avino testified to was August 28, 1943.

A. Yes.

Q. Did you hear some testimony given here that in order to purchase a scarce article, you required or demanded that your customers purchase a plentiful article; do you recall that testimony?

A. Yes.

Q. Did you ever make such a demand?

A. No.

\*Q. Did you at my request pick out from your records of that particular date the original sales slips showing the sales of scarce articles alone?

Mr. Burchill: I object to that. I object to the form of the question and the question itself. It is leading this witness.

Mr. Stim: Your Honor, I have the record here.

The Court: It makes no difference what you have, he is objecting to your question. In the first place, it is leading,

and secondly, it is directed to an issue which is not involved here, according to my understanding.

Mr. Stim: May I be heard on it?

The Court: Yes.

Mr. Stim: The issue here is that this defendant compelled merchants who were buying from him, in order to obtain a scarce article, to buy with it in combination a plentiful article. I am merely asking him whether or not [fol. 90] that is so. He said no. I desire to show by records that on the very same day, which is the date testified to by the witness for the Government, that the situation is different.

The Court: That has no bearing on the particular issue pinvolved.

Mr. Stim: Wouldn't that aid the jury to determine

whether or not that happened?

The Court: Because you didn't do something for me doesn't mean you didn't do something for somebody else, and it doesn't prove anything. Why try to prove issues that are not involved here. Why prove your innocence on charges that haven't been made against you?

Mr. Stim: The only way I can prove my innocence-

The Court: You can prove he did or did not have the transaction. He is not charged with that and we are limiting this trial to the other transactions.

Mr. Stim: Your Honor, may I have these cards marked for identification, and then I will offer them and your Honor

will refuse my offer and I will have an exception?

The Court: Yes.

(Marked Defendant's Exhibit E for identification.)

Mr. Stim: I have a great number of such cards to offer and rather than encumber the record, I would just like to make a general offer and your Honor will sustain the objection and I will have an exception?

The Court: Very well, I sustain the objection and you

may have your exception.

[fol. 91] Q. How many transactions did you generally have in the course of the night?

A. Oh, I would say about a hundred to a hundred and

twenty-five.

Q. How many in the course of a year?
A. 24 thousand or 30 thousand a year.

Q. And how is the merchandise sold by you. Do you ever sell anything other than at ceiling prices?

A. No, sir, I never get anything above ceiling at any time.

Q. Are there occasions when you sell merchandise below ceiling prices?

A. Plenty of times.

Q. After this record is made by you, the original record, do you send a bill out to the customer?

Mr. Burchill: If your Honor please, I think he is still leading the witness. He can ask what he does.

The Court: Well, that isn't very material. Go ahead.

A. After these sales are made, we give it to the book-keeper and she makes out a bill, duplicate bill, with the initials of the salesman, the amount, the commodity and the price. That bill is held until the end of the week and then sent out to our customer.

Q. And Government's Exhibit 13 is one of these, isn't that so?

A. Yes, sir.

Q. What is the initial W.S.?

A. W.S. shows that I made the sale.

Q. And if anybody makes a sale of such merchandise, his initials would appear on it?

A. Whoever the salesman may be.

Q. Mr. D'Avino testified about a certain transaction or transactions, I think three or four or five on the average; how often did you sell to the firm of D'Avino Bros.?

[fol. 92] Mr. Burchill: I don't see what relevancy that has, your Honor.

The Court: It may be introductory. Go ahead.

A. I will say I sold that man a thousand times. I will safely say better than a thousand times.

Q. Will you tell the Court and jury what is your best recollection of the conversation you had with D'Avino when he came to you to purchase merchandise on August 28th, August 30th, September 10th and November 19th of 1943?

A. Whatever conversation Mr. D'Avino had with me. If he would ask for carrots, for instance, I would say "What

else do you want?" If he asked for lettuce, I would say, "What else do you want?" And if he asked for honeydews, I would say "What else?" I always try to sell whatever commodity I have, and I have a habit of asking anybody "What else do you want?" trying to self everything we have.

Q. Did you ever tell him, you must take, let us say, carrots in order to get peas?

A. No, sir, I would say, "What else do you want?" but never say that he has to take anything.

Q. How many merchants are handling the same merchandise that you are handling?

A. I counted 252 merchants that are in our market.

Q. All handling the same type of merchandise?

Q. In order to buy merchandise from shippers, how is that sold to you?

A. In all ways we buy it.

Q. When you order anything on the market, how do you order and what do you receive?

A. Well, we go out and buy f.o.b. right at the shipping point, and buy direct from the farmers, and buy all commodities.

[fol. 93], Q. Do you buy only scarce articles?

A. I do not know what is scarce. It takes a car 12 to 15 days to get here. What is scarce today might not be scarce tomorrow or the following day. It may or may not be scarce when it comes in.

Q. When you ordered merchandise, how long does it take to receive it in New York?

A. 12 to 15 days.

Q. And can you tell at the time you order it what is scarce or is not scare?

A. That is impossible.

Q. What does it depend on?

A. Depending upon demand and supply, weather conditions; everything enters into it.

Q. Do you request cash payment when the merchandise is scarce or otherwise?

A. I do not think I have one per cent. Out of \$1,800,000 business I do not think one per cent of that is cash. Everything is practically charge.

Q. And is every one of your transactions entered in the

books !

A. Positively.

Q. Did the OPA examine your books?

A, Yes, sir.

Q. How long were they there?

A: I think there were three men there for from seven to ten days.

Q. And they had the books available, all of them?

A. Everything they asked for they got immediately.

Q. And was there a single transaction on the books which was not properly recorded?

. A. No, never been so in my business.

Q. Did they make any complaint about any transaction not recorded?

A No, sir. The OPA is here for that (indicating).

The Court: There is no such charge here. You are trying to show he is innocent of something he is not charged [fol. 94] with. I am going to confine this case to the issues here involved. You confine your testimony to these issues. We can't be trying this man for something nobody is accused of.

Q. Were you always in the place of business?

A. Most of the time. When I am in New York I am in the place of business.

Q. Are there occasions when you are away from New York?

A. Oh, yes. I am away as often as I can: California, Texas; I go to Chicago. I go down South.

Q. What is the purpose of going to those places?

A. Well, to make all sorts of deals for the coming season, and there is all different things. I have to go out and buy up crops or make some arrangements.

Q. When you leave, do you leave any instructions with

your salesman?

A. When I leave I just tell my salesmen the business is in their hands, and I expect them to do all they can; the business is in their hands.

Q. Did you ever give any instructions asking them that they compel or demand that customers purchase a plentiful article with scarce commodities?

A. In our business we can't do that. We do not know what is scarce tonight. A freeze came last night—there is an incident—and spinach—

Mr. Burchill: L submit that the question calls for Did he give any instructions?

The Court: I do not think there is any occasion to go into any instructions he gave his salesmen. We are not charging him here with any transaction that involves his salesmen, except perhaps one. I think I will eliminate all [fol. 95] of them except the one where Mr. Silverman has testified that he was present there and directed him to go to Mr. Leef. I think that is count No. 2 You can ask him about any directions to Mr. Leef. indicated we want to try this case and not some other general proposition. Objection sustained.

Mr. Stim; Exception.

.The Court: All right, you may have your exception.

Q. Did you at any time wilfully or knowingly evade the provisions of Revised Maximum Price Regulation No. 426 by demanding, making and requiring any of the witnesses who testified here against you, to purchase a plentiful commodity as a condition of the sale to them, as an integral part thereof, of the sale of a scarce commodity?

Q. Did you ever receive from the Office of Price Administration any instructions concerning the so-called tie-in sales, what you can sell and what you cannot?

Mr. Burchill: I object to the question on the ground that the regulation speaks for itself.

Mr. Stim: Your Honor, on the question of intent.

The Court: Well, step up here. (Let us see what you are driving at.

(Counsel confer with the Court at the bench out of the hearing of the jury.)

The Court: Objection sustained. Mr. Stim: Exception.

Q. What directives, if any, did you receive or did the industry receive, if you know, from the War Food Ad[fol. 96] ministration for the sale or combination of sales of scarce articles with plentiful articles?

Mr. Burchill; I object.

The Court: That is the same thing. Objection sustained. Mr. Stim: Exception.

The Court: I understood you to object to it?

Mr. Burchill: Yes.

The Court: The regulation fixes the law, unless you propose to show affirmatively that he received something that was contrary to the regulations?

Mr. Stim: I already stated to your Honor the purpose.

The Court: Yes, you did so.

Q. Do you know of your own knowledge if the Administrator ever granted the request of your industry to find as a fact whether or not the so-called tie-in sales are a violation of the law?

Mr. Burchill: I object.

The Court: Objection sustained. Mr. Stim: That is all, your Honor.

Mr. Burchill: Would your Honor want me to start tonight?

The Court: Yes, I think you might proceed until half past four.

Cross-examination.

## By Mr. Burchill:

Q. Now, Mr. Shapiro, you testified on direct examination I believe, that it is necessary for you to dispose of all of your merchandise in from four to six hours, is that correct? A. Try to.

[fol. 97] Q. Well, is that what you testified to, that it is necessary to dispose of your merchandise in that period of time?

A. Yes.

Q. And you use any means available to dispose of it in that time?

A. No, sir.

Q. Is it correct to say that there is a great deal of pressure to dispose of it in that period of time?

A. Well, we try to sell out. This is perishable merchandise. We want to sell out to the best of our ability.

Q. Do you leisurely sit there and take orders?

A. No, we try "What can you use? What do you want?"

Q. Well, that is what I am asking you-

A. We try to sell everybody.

Mr. Burchill: I think if you wait until I put the question we will get along better. You see, I can't hear you when you are talking and I am talking. If we both talk together it is difficult for everybody.

Q. I say, there is a great deal of pressure on during the four to five hours that you are trying to get rid of the merchandise?

A. Sometimes.

Q. Now, in this invoice of Mr. Deroshinsky, I show you Government's Exhibit 16 in evidence, and ask you to look at that exhibit. I believe that is the one that you testified to concerning the fact that the item celery was first?

A. That is right.

Q. And that the man had purchased the celery before the lettuce, is that correct?

A. That is right.

Q. Is that true in every instance?

A. Well, most of the time.

Q. The plentiful item is listed first?

A. Oh, no; whatever commodity the man asks you for. [fol. 98] Q. Well, isn't it a fact that the reason that that is done is to make sure he buys something else before he gets the scarce item?

Mr. Stim: I object. He is asking for a conclusion. The Court: Overruled. This is cross-examination.

A. Whatever the man asked for-

Q. Answer the question. Do you know what the question is?

A. No, sir.

(Question read.)

A. No, sir.

Q. I show you Government's Exhibit 4 in evidence, which is the invoice of Schwartz Brothers Company, I believe that is right, and ask you if the same is not true of that invoice as the previous invoice?

A. Yes.

Q. And the same is true of Government's Exhibit 12 in evidence?

A. That is right.

Q. And the same is true of Government's Exhibit 2 in evidence?

A. Here is the celery on here, \$5.50 (indicating). Lettuce is ceiling. The spinach 1.12%, which is about 90 cents lower than the ceiling, or about half. It all depends where the man asks for it how it was put down. Here it is (indicating).

Q. That is what I am asking you about. Isn't it a fact that the lettuce was selling at the ceiling, and wouldn't

that indicate it was short?

A. No, they could be selling at the ceiling and still be plentiful.

Q. I ask you whether or not the same is not true of Gov-

[fol. 99] Mr. Stim: Well, what is "the same"! The ex-

The Court: What do you mean by "the same is true"?

Mr. Burchill: That the plentiful item, as testified to by the Government, is listed first and the scarce item is listed secondly.

The Court: I do not think the question is proper. There is no difficulty in pointing out the item referred to. There may be a dispute.

The Witness: I wouldn't know offhand right here "indi-

cating).

Q. Isn't it a fact that the price is some indication of whether or not a commodity is scarce or plentiful?

A. Well, we will take the "S. & I." Your lettuce is a scarce item and everything else is not. Each bill is different, just depending upon how the man asked for the merchandise. Let us take the bills:

Q. Suppose you are wer my questions and let me run it.

A. I will, sir.

Mr. Stim: He is getting the answer.

Mr. Burchill: Do you want to testify, Mr. Stim?

Mr. Stim: No, I have a right to intervene on behalf of my client.

Q. Now, you also testified on direct examination, I believe, that you can't compel anybody to buy anything.

A. Positively.

Q. But if they do not buy a plentiful item they do not get the scarce item?

A. They will get the scarce item if I have it. They sure

will.

[fel. 100] Q. If they do not buy, according to your terms, they do not have to buy at all, is that correct?

A. Oh, no. I am not in business for 28 years for that. That is the way I built my business up, to be honest about it.

Q. You testified there were 253 merchants similar to yourself.

A. About that.

Q. On a day a commodity is scarce do each of those 253 merchants have the scarce commodity?

A. I do not know how many have it.

Q. Well, you testified on direct examination that they could go to any one of the 253 and buy what you had.

A. There is 252 merchants in the market.

Q. Did you testify on direct examination that any of these customers who were Government witnesses could go to any one of the 253 merchants in the market and buy the same items they had bought from you on the particular day in question?

A. I do not know exactly—

Q. Did you testify to that?

A. I testified.

The Court: Let him answer.

A. (Continuing:) I testified there were 252 merchants in the market and we all handled practically alike. I do not know what the other people have. I know that I have.

Q. Did you testify that the Government witnesses could have bought scarce commodities that they bought from you on a particular day from anyone of the other 253 merchants in that market on that day?

A. I do not know what they have.

Q. Did you testify to that?

A. I testified it was 252 merchants that were

Q. And that these Government witnesses could have bought it from anyone of the 253 merchants in the market?

A. I still do not know what they are doing.

[fol. 101] Q. Did you testify to that?

A. I do not know.

Q. Could they?

A. Certainly if they have it. Why not?

Q. Do each of the 253 other merchants have scarce commodities every day, the ones that you had?

A. Everybody looks at their business.

Q. Will you answer the question?

A. I do not know what the other people do.

Q. You do not know. That is the answer?

A. I do not know what they do.

Mr. Burchill: That is right. You do not know.

Q. Suppose ten carloads of a particularly scarce commodity comes in, how many receivers get those ten carloads?

A. I wouldn't know.

Q. How many would you get?

A. It all depends.

Q. You have been in the business for 28 years; you have seen ten arloads come in at a time.

Mr. Stim: I object to that. We are going into the realm of speculation.

The Court: Objection sustained.

Q. You have testified on direct examination, I believe, that Mr. Doreshinsky returned some goods to you; is that correct?

A. I do not remember testifying to that:

Q. Well, maybe I misunderstood you."

A. I said he could have if he wanted to. I wouldn't know whether he did or not.

Q. Would you know whether or not anybody else had returned any?

A. I do not know, but we have records of anybody returning.

[fol. 102] Q. You have the records?

A. Oh, certainly. Plenty of merchandise is returned daily when they do not like it.

Q. Of scarce and plentiful items?

A. Everything. Plenty of it.

Q. Now, I show you Government's Exhibit 2 in evidence concerning which you testified that the entire transaction was held or handled by Mr. Leef; is that correct?

A. That is right, sir.

Q. I believe you also further testified that it would be impossible for a salesman's initials to appear, or for you to have handled that transaction if your initials did not appear on the invoice?

A. That is right, sir.

Q. Now, will you tell us why that is impossible?

A. Because, when we gave our sales ticket upstairs to the bookkeepers when they made out the bills the same day as the sales are made—

Q. That is a different floor?

A. Yes. We leave our books, and this is made out maybe nine, ten, eleven, twelve, or maybe two in the afternoon by a billing clerk.

Q. The same day the sale is made?

A. Yes, it is made the same day that the sale is made. They are put off the salesman's book with his initials along-side, the amount of packages—

Q. Are you talking about this invoice?

A. No, sir.

Q. Well, this particular one?

A. Well, this would be Mannie Leef sold on December-

Q. Well, I understand what the invoice says. The jury can read it.

A. (Continuing:)—ten celery. The reason it is Mannie Leef, if there is any complaint or returns, if there is any dispute about the price or anything, we know which salesman is the one; and everyone of our bills will show a salesman's initials on it.

[fol. 103] Q. First of all do I understand you correctly—

A. Can I explain further?

Q. Please.

The Court: If there is a further explanation he may make it.

A. (Continuing:) There is another reason that we have to have the initials, when we make out our sales tickets we never put a price on it. We always put the price on it late in the morning when all the sales are done, so in case there is any dispute on the prices we know which salesman to go to; therefore I cannot sell a man and tell one of my salesmen to make out a ticket. He wouldn't know the price I sold it for.

The Court: We will suspend here, gentlemen.

Ladies and gentlemen, during the recess of the court do not discuss this case among yourselves and do not permit anybody to discuss it with you, and do not make up your minds about it until it is finally submitted to you.

We will recess until 10:30 tomorrow morning.

(Adjourned to December 18, 1945, 10:30 o'clock a. m.)

New York, December 18, 1945, 10:30 a.m.

Trial resumed.

WILLIAM SHAPIRO, resumed the stand.

Cross-examination.

### By Mr. Burchill (Continued):

- Q. I believe you testified yesterday, Mr. Shapiro, on direct examination, that OPA investigators worked in your [fol. 104] place of business for seven to ten days and found nothing wrong, is that correct?
  - A. Yes.
- Q. And that they had all of your records available to them?
  - A. Yes.
- Q. And you produced everything for them and were very cooperative, is that correct?
  - A. Yes, sir.
- Q. I believe you also testified that you had a complete and accurate set of books and kept all records required by the Office of Price Administration?
  - A. That is right.

GEORGE J. REDDEN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

### By Mr. Stim:

- Q. Mr. Redden, where do you live?
- A. Red Bank, New Jersey.
- Q. Are you in business in New York City?

A. Yes.

Q. What is your occupation?

- A. I am perishable agent for the Baltimore & Ohio Railroad.
  - Q. How long have you been in that position?

A. About 22 years.

Q. Do you know the defendant William Shapiro?

A. About nine years.

Q. And during that time did you have occasion to know people who know him?

A. In the trade, yes, sir.

Q. And did you have occasion to discuss with these people Mr. Shapiro's reputation for honesty, integrity and truth telling?

A. Yes, sir.

Q. And what is that reputation?

A. We always found it to be excellent.

[fol. 105] Mr. Stim: That is all.

Mr. Burchill. No questions. Your Honor, may we approach the bench please?

The Court: Yes.

(Colloquy between Court and counsel at the bench.)

(Whereupon Court and counsel retired to chambers, where the following occurred:)

Mr. Stim: Your Honor, the defendant wishes to offer testimony of a number of merchant customers who purchased merchandise from him during the same period as covered by the informations during the identical days involved here, who will testify to the fact both by their own testimony and documentary evidence we have, of the identical days in which the defendant is charged with compelling some of the witnesses to purchase plentiful articles on condition of buying scarce articles, and that these witnesses purchased scarce articles without the requirement of buying plentiful articles, and they will further testify that there never was any compulsion in dealings with the defendant.

Mr. Burchill: I object to the offer of such testimony on the ground that it is irrelevant and has nothing to do with the issues in the case as charged in the information. The Court: The objection will be sustained and exception allowed.

Mr. Stim: Exception.

(Argument off the record.)

The Court: Let the motion to dismiss count No. 2 be sustained.

#### MOTIONS TO DISMISS

Mr. Stim: Your Honor, at the end of the Government's case I made certain motions, and now, at the end of the entire case, I renew all the motions I heretofore made with the same force and effect as though made in detail at this time.

[fol. 106] The Court: Overruled insofar as motions made, except as to count number 2.

Mr. Stim: Exception.

Your Honor, I further move to dismiss the information on the ground that the Government has failed to show that any of the commodities involved in the transactions which are before the jury above price ceilings or what the price ceilings are, and whether or not there was any violation of the price ceilings. I submit that is a question of fact and not a question of speculation for the jury.

Mr. Burchill: It is a question of law.

The Court: Overruled.

Mr. Stim: Exception.

With all respect to the Court, I may say that a serious error was made in that the Government has failed to prove the regulations. While the Court may take judicial notice of a law, I don't think the Court can take judicial notice of the regulations.

(Court and counsel returned to the courtroom.)

The Court: Ladies and gentlemen of the jury, I sustained the defendant's motion to dismiss as to count number 2; that is the count which related to Mr. Silverman's transaction; not with the defendant Shapiro but with one of his salesmen, Mannie Leef. It is my opinion that there was not direct proof of Mr. Shapiro's participation in that sufficient to justify submitting that to the jury, and that is eliminated.

Does that close your case?

Mr. Stim: Your Honor, the defendant rests.

The Court: Anything further?

Mr. Burchill: No rebuttal, if your Honor please. The Court: You may proceed with your argument.

(Mr. Stim summed up the case to the jury on behalf of the defendant.)

(Mr. Burchill summed up the case to the jury on behalf of the Government.)

[fol. 107] CHARGE OF THE COURT

The Court: Ladies and gentlemen: In your consideration of this case, the responsibility comes to me to see to it, as far as I can, that you understand, at the outset, the nature of the charges that are made here against this defendant; in other words, that you may understand what the applicable law is. I hope, if there is any confusion or doubt in your minds as to the law, you will frankly and candidly ask me about it, because we don't want any doubt about your clear and accurate understanding of the nature of this problem;

In the first place, under the laws of the United States, the Office of Price Administration adopted a regulation which is known as No. 426. That regulation was in force during the periods involved in this case. It effects certain price limitations upon the commodities, fruits and produce, that are referred to in this case. It made a further provision that I want to read to you in order to clarify it for you, if there is any doubt about this that re-

quires clarifying:

"The price limitations which are set forth in this regulation shall not be evaded, whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt, or relating to fresh fruits or vegetables alone or in conjunction with any other commodity, or by way of commission, service, transportation or any other charge or discount, premium or other privilege or by tying agreement or other trade understanding or otherwise."

That regulation has for its purpose a prohibition of direct or indirect methods of evading the price limitations.

[fol. 108] Now, this information charges that this defendant at various times evaded the provisions of this price regulation by doing certain things, by demanding and requiring that in order to purchase one or two commodities that the purchaser desired, they should take other commodities that they did not desire and that they did not seek, and by so doing he brought about an evasion of the price limitation by securing, in addition to the price of the articles the purchaser wanted, the sale of additional articles that he did not want.

Now I do not mean to say to you that this regulation prohibits the sale of numerous articles at one time. That is not the point. In the ordinary and reasonable course of business, a merchant can sell by appropriate and air means all that a man will buy from him, and this regulation does not deny that right, and it would be ridiculous to deny such a right. The merchants who have commodities on hand which are perishable naturally want to get rid of those articles and there is nothing in this regulation which prohibits or tends to prohibit or is designed to prohibit the sale of those articles in combination with scarce articles, provided it is a sale without compulsion. That is, without requiring or demanding it as a condition that the purchaser procure what he wants or what he needs. The regulation is directly and specifically clear against the evasion of the price limitation by forced sales as a condition or in combination with other things. want to make this clear that the issue in this case is whether certain commodities were forced upon these persons in that they were required to buy them in order to. get the commodities which they wanted to purchase.

When I use the word "forced" or the word "compulsion," I don't mean physical force. I am sure you understand that. The regulation is not directed to that. [fol. 109] It is not limited to that. I don't mean that a man is coerced by taking him by the throat and compelling him to take it. There is a lot of difference between a physical force or coercion and business coercion. Business coercion, nevertheless, may be just as effective in acomplishing its purpose as physical coercion. A man is in business. He needs a certain commodity in his business. He comes to this man for this commodity and finds that he has it. Now, if he says to him "If you take this, you have to take this along with it." There is in that trans-

action a form of business-coercion and that is what this regulation is directed to, and that character of transaction is what is charged. That is all that is charged here. It is charged that it is a demand, and that as an integral part of the sale of one commodity the purchaser was required to take one or more additional commodities, and if that is true, under the evidence that you have heard, this defendant should be found guilty, provided your conviction of the truth is established by the evidence beyond a reasonable doubt.

The mere fact that a man is charged with an offense is not proof of it; the information itself is not proof of anything. It is merely a definition of the charge that is made, and the fact that there are a large number of counts in the information, many of which I have dismissed, is a matter of no significance to you now because you are to concern yourselves only with those particular counts that are left. You will notice that the counts that are submitted to you, eleven of them, are counts in which the witnesses for the Government testified that they had the transaction directly with the defendant Mr. Shapiro.

There are a large number of other counts in which the witnesses were not definite in their statements or in which they said they transacted the business with somebody else, [fol. 110] some clerk or somebody besides Mr. Shapiro. I have eliminated all of those so we may narrow the question down to the counts on which the evidence is direct and on which the issue is squarely and cleanly made as to whether the man violated this regulation, that is, whether Mr. Shapiro violated this regulation in the man-

ner charged in these counts.

Now, before you can find him guilty on any one of them, the evidence must satisfy you of his guilt beyond a reasonable doubt. Reasonable doubt means exactly what it says. The evidence must be sufficiently satisfactory to enable you to have a settled and satisfied opinion that he is guilty. Of course, absolute proof to a certainty beyond all peradventure of doubt is not required and is not expected. That is not what reasonable doubt means. Reasonable doubt means a doubt having a reasonable and sound foundation either in the evidence or the nature of the evidence or lack of evidence and it must be such a doubt that interfer-s with your reaching a satisfactory conclusion. So much for the reasonable doubt. If you

have a reasonable doubt with respect to any of these counts or with respect to the evidence, he is entitled to the benefit of that doubt and he should be acquitted on the count or counts as to which that doubt may exist.

Before I come to a discussion of all the counts in the information, I might appropriately make some reference to the fact that there has been some evidence introduced here on the good reputation of the defendant. The man is charged with violating a law and he is entitled in his own behalf to introduce proof of his good reputation. Good reputation is a most valuable asset, and it is sometimes the only asset a man has outside of his own testimony in a case. It may sometimes be sufficient in close cases to turn the scales in favor of the defendant to gen-[fol. 111] erate a sufficient doubt or reasonable doubt. As to what weight is to be given to the testimony here as to reputation, the Government points to the fact and has a right to point to the fact that it comes largely from his dealers in other States, persons who have been serving his extensive business. All of that is a proper matter for your consideration so as to determine what weight should be attributed to that evidence, and I am leaving that entirely to you without any expression of opinion on it or any comment on it. You are experienced men and women, and with that statement as to the law of this case. I want to narrow the questions down to just the issues involved in each of these counts and see if we cannot simplify for ourselves our consideration of them.

The first count charges a transaction that took place on the 20th day of November, 1943, between Mr. Silverman and Mr. Shapiro himself. Now, as in all of these counts, a good many of the facts are not disputed. It is not disputed that that transaction took place, It is not disputed that on that occasion Mr. Silverman purchased the commodities that are stated in the information. It is not disputed that he paid the prices that were charged him, and Mr. Shapiro does not dispute that he conducted the transaction with Mr. Silverman as set out in the information. Where then is the dispute! What is the trouble? Silverman contends that he was coerced and was required to take something that he didn't want and that he was required to do it in order to get something that he did want, Mr. Shapiro says no, he didn't make any such requirement? He says, "I just had these perishable goods on my hand. and I said in the regular course of business, that else do you want? That is the way I sell my goods. That is the only way I urge people to take it. I wanted to sell it and [fol. 112] I do not argue with a man and urge him to buy something else in addition to what he called for."

How are you to decide where the truth lies? It is sometimes very hard to tell who is telling the truth. I will comment on a method we might adopt in that respect when

I get through with these counts.

The third count in the indictment is another transaction between Mr. Silverman and Mr. Shapiro-I am mistaken about that—the next count is the count in which it is stated that Mr. Shapiro, or it is charged that Mr. Shapiro evaded the provisions of this regulation by requiring J. Simensky & Company to purchase certain commodities as an integral part of a transaction that is described here in this count. I think you ought to read these counts pretty carefully. That count is supported by the testimony of a man named Deroshinsky, as I recall his name. I had a good deal of difficulty with these names because I am not familiar with them. Now, Mr. Deroshinsky testified very positively that Mr. Shapiro said "You have got to take these other things in order to get the commodity" that he demanded. The issues there are sharply drawn. Mr. Deroshinsky and Mr. Shapird, as we readily observe, are not very friendly. Mr. Shapiro's testimony is squarely in contradiction of him. He says that he did not have a transaction with him and that he had not had any business transactions with him for years. According to his statement, Mr. Deroshinsky is very positive in his statement as to what took place. You will have to determine who is telling the truth about that.

Then there follow five counts, 7, 8, 9, 10 and 11, that concern Mr. D'Avino in those transactions. They took place the 20th of August, 1943, 28th of August, 1943, 30th of August, 1943, 10th of September, 1943, and 19th of

November, 1943.

[fol. 113] Mr. D'Avino testified that he had the transactions described in these counts with Mr. Shapiro himself; that he went to buy a certain commodity as set out in this count; and Mr. Shapiro demanded that he take other commodities that D'Avino didn't want, and said you have got to take that with the others. The question is whom to believe. That is all. It narrows down to a very simple issue. I mean it is simple to describe to you the issue, but

not a simple issue to decide. Now, it is just a question whether Mr. Shapiro is telling the truth or whether Mr. D'Avino is telling the truth. Mr. Shapiro denies it. He said, "I merely urged the sale of my commodities by asking what they wanted in addition and that is all I did, in a fair business-like way." That is his defense to each of these charges.

Then we follow with counts 42, 43, 44, and 46, which are supported by the Government witness Mr. Anthony Bentivenga-that is about as near as I can get to it-you may call it something else but I am sure you will remember the gentleman. He was the man, as I recall, who was buying for the Schwartz people. He was an employee of the Schwartz Produce Company and Mr. Schwartz or whoever it was who usually did the buying was sick and Mr. Bentivenga was buying in his place during his illness, on the 6th of September, the 13th of September, the 15th of September, and the 29th of September, 1944, and he testifies that on each of those occasions Mr. Shapiro had the transaction with him, and the substance of his testimony was that Shapiro demanded and required, in order that he get certain commodities that he wanted, that he should take these other commodities there specified in these counts. Shapiro says it is untrue and that he did no such thing; he didn't demand or he didn't require it and he did not compel [fol. 114] it and he did not make the condition of purchase, he merely urged as an ordinary business transaction, as any salesman would urge the sale of his commodities on a prospective purchaser. So we have the issue very narrowly drawn as one of credibility. If the facts are as these witnesses for the Government have stated, as to any of these counts under the law, if you believe those to be the truth, beyond reasonable doubt, as I have defined it, it is your duty, whether you agree with the policy of the law or not, it is your duty as jurors to find the defendant guilty. But if you have a reasonable doubt as to any of the counts, the counts as to which that doubt may apply should be dismissed and the defendant should be acquitted under them, because he is entitled to the benefit of the doubt. burden rests on the Government throughout the case to establish guilt beyond a reasonable doubt and that burden never shifts to the defendant to prove his innocence. Government throughout must carry the burden of proving the guilt of the defendant. What I have said to you regarding the law in the case is binding upon you, of course. I am the only source from which you can get information as to the law applicable to the case. As to the facts, you are the sole judges. I may comment on them and I may undertake to narrow the issues down for you and assist you in arriving at what the truth is, but you don't have to accept that assistance if you don't want to, and if you feel it is really not of any assistance to you, you need not consider it. You will be the judges entirely of what consideration you

should give to the comments I give you in the case.

As I view the case, the dispute remains as to whether D'Avino, Deroshinsky, Silverman and the other Government witnesses are telling the truth about the transactions that they had here in so far as they say they were required [fol. 115] by Mr. Shapiro to take commodities which they did not order and did not want in order to make a purchase of commodities which they did want, or is Mr. Shapiro telling the truth when he says, "I did not compel or require or demand that they take these commodities and they bought them of their own free will," and he only did what any good salesman would do in trying to sell his goods, that is all.

I always sympathize with a jury when it has to decide who is telling the truth, in a case where one man says one thing and the other man tells the opposite. How are we going to do it! I don't know a better way to decide a matter. like that than to leave it to twelve experienced men and women. I am a great believer in a jury trial on the facts where credibility of witnesses is the turning point. I believe that men and women who have gone up and down in this world and have rubbed up against their fellow men, have seen their conduct, can judge their motives by their actions, by their interest involved—all those things that might determine the credibility of a man's testimony. I believe jurors taken from a large community, a sort of cross-section of the country, men and women who have had experience, are peculiarly capable of doing it. I do not undertake to lay down any rule of thumb as to how it is done or should be done. You have a right to judge from seeing a witness on the witness stand, from hearing him talk, from observing his conduct, from observing his responses to questions, determining whether he has any interest at stake; has he any axe to grind that should cause him to tell a falsehood? What is his interest in the case?

We have had men who were summoned by the Government. Have they any interest in the case sufficient to cause them to tell a falsehood? Can you give weight to what they say? [fol. 116] You have a right to consider whether a man is in any way motivated to make a false statement. It is obvious that both these statements cannot be true, that is, those testified to by the Government witnesses and those testified to by or on behalf of the defendant Shapiro. It has to be one or the other. Of course, the defendant must subject himself to the same test that these other witnesses are subjected to. Has he got any interest here? Is there any motive that would induce him to deny that he made those statements to these witnesses if he did make them? What has he at stake that would motivate him to tell a falsehood?

I have no further suggestions to make, ladies and gentlemen, as to how to determine what is the truth in this case, and upon your shoulders and your consciences under your oath rests the vital and important duty in this case to decide where the truth lies. Whatever I have said to you is not done with any purpose to influence you improperly or unduly control your judgment but merely to assist you in reaching a just and righteous verdict in determining what the real truth is and what the true facts are.

A unanimous cerdict is necessary on each count of the information. I have taken out of the information those counts which were dismissed, so as to leave only here the particular counts on which you are to render your verdict and, of course, a careful examination of these charges will be entirely appropriate and I think necessary in order for you to reach a determination with regard to each of them.

Gentlemen, have you any suggestions as to further instructions?

Mr. Burchill: I have no suggestions.

## [fol. 117] . REQUESTS AND EXCEPTIONS

Mr. Stim: May I respectfully ask your Honor to charge with request No. 1 of my Requests to Charge?

The Court: I think the request has been sufficiently covered in the instructions already given.

Mr. Stim: May I have an exception to your Honor's culing?

The Court: All right.

Mr. Stim: Will your Honor be good enough to charge

The Court: I think I have already covered that point. There is nothing in the regulation that prohibits the sale of commodities together in combination with each other unless there is some coercion involved. I decline to give the instruction as you have written it:

Mr. Stim: Exception.

I respectfully ask your Honor to charge No. 8. The Court: Declined.

Mr. Stim: Exception.

I respectfully ask your Honor to charge No. 10.
The Court: Declined.

Mr. Stim: Exception.

I respectfully ask your Honor to charge No. 11.

The Court: Declined. Mr. Stim: Exception.

No. 12.

The Court: Declined.

Mr. Stim: Exception.

No. 14, your Honor.

The Court: Declined, in the terms suggested. I have already covered the same facts in my charge.

Mr. Stim: Exception. No. 15, your Honor.

The Court: Declined. I don't see any occasion to charge that.

[fol. 118] Mr. Stim: Exception.

No. 18.

The Court: I will give that instruction. Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the jury to acquit.

Mr. Stim: No. 19, your Honor.

The Court: No. 19. I see no reason why I should not say to the jury that that is the law of the case, and it is this: As the verdict of the jury must represent the real opinion and judgment of each member of the jury, no juror should acquiesce in the verdict against his individual judgment.

I will qualify that by saying that no juror should set himself up so as not to be willing to listen to reasonable arguments of his fellow jurors and take an arbitrary position without listening to fair argument from your fellow jurors. Of course, in the ultimate determination of these matters, however, each juror is bound by his own conscience under his oath to do what he thinks is right and proper. Mr. Stim: May I, your Honor, make my requests as part of the record.

The Court: Yes.

Mr. Burchill: The Government has no objections to the charge.

The Court: Ladies and gentlemen, you may retire.

(The jury retired to deliberate.)

(The following occurred in chambers:)

The Court: Gentlemen, the jury have just submitted a note reading as follows:

"Please submit the transcript of minutes of the testimony on counts 7, 8, 9, 10, 11."

#### [fol. 119]

#### DISCUSSION

Is there any objection to my reading the testimony of Mr. D'Avino?

Mr. Stim: No objection.

Mr. Burchill: No objection.

(The jury returned to the court room at 3:10 p.m.)

The Court: Ladies and gentlemen, I received your request for the transcript of minutes of the testimony referring to counts 7, 8, 9, 10 and 11, and the attorneys have agreed, and I concur with them, and I will read the testimony to you upon those counts. Those counts are the counts in reference to the testimony of Mr. D'Avino, and if you will give it your careful attention I will read you the testimony of Mr. D'Avino.

(The Court read testimony of witness D'Avino.)

Mr. Stim: Would your Honor be good enough to refer to page 173?

The Court: I will read whatever you point out to me as

having any bearing.

Mr. Stim: There is a question here:

"Q. Will you tell the Court and jury what is your best recollection of the conversation that you had with D'Avino?"

The Court: All right. I am reading now as pointed out by Mr. Stim, page 173, testimony of Mr. Shapiro on direct examination.

(The Court reads record.)

Mr. Stim: I think the next one goes to Simensky.

The Court: Is there anything further?

Mr. Stim: That is all, your Honor, on the testimony of D'Avino.

The Court: Ladies and gentlemen of the jury, that concludes the testimony.

The Forelady: Thank you very much, your Honor.

(The jury retired at 3:30 p.m. to deliberate.)

[fol. 120]

VERDICT 3

(The jury returned to the court room at 3:45 p.m.)

The Clerk: Will the jurors please answer when your names are called?

(Jurors answer to their names as present.)

The Clerk: Madam Forelady, have you agreed upon a verdict?

The Forelady: Yes, we have.

The Clerk: How say you?

The Forelady: We, the jury, find the defendant not guilty on counts 1, 3, 42, 43, 44 and 46; and we find him guilty on counts 7, 8, 9, 10, and 11.

The Clerk: Members of the jury, listen to your verdict as it stands recorded. You say you find the defendant not guilty on counts 1, 3, 42, 43, 44 and 46.

The Forelady: That is right.

The Clerk: And guilty on counts 7, 8, 9, 10 and 11.

The Forelady: That is right.

The Clerk: And so say you all.

Mr. Stim: May I have the jury polled?

The Clerk: Listen to your verdict as it stands recorded. You say you find the defendant not guilty on counts 1, 3, 42, 43, 44 and 46, and that you find the defendant guilty on counts 7, 8, 9, 10 and 11.

(The clerk polled each individual juror who answered in the affirmative.)

The Court: Let the verdict be entered,

That concludes the services of the jury in this case, Mr. Clerk.

The Clerk: Yes. Please return to room 109.

The Court: Thank you very much, ladies and gentlemen of the jury.

Mr. Stim: Your Honor, can we dispose of the motions here?

The Court: Yes.

#### [fol. 121]

#### VERDICT

Mr. Stim: I move to set aside the verdict as being against the weight of the evidence and contrary to law and against all of the evidence in this case:

The Court: The motion is overruled.

Mr. Stim: Exception.

May your Honor proceed with sentence now?

The Court: Yes, I will do that now just as well as any other time.

Mr. Burchill: I have not discussed the matter of sentence with the office, and I am bound as far as the rules of my office are concerned to discuss it with them before—

The Court: Supose we do that.

Mr. Stim: In view of the fact that the case has been disposed of, your Honor should proceed with the sentence now.

The Court: What is the hurry?

Mr. Stim: I have been tied up with this case for weeks and I am going on trial in several other cases. It seems to me your Honor has all the facts fresh before him and I do not believe it would be against the interests of justice

if your Honor disposes of the situation now.

The Court: No, I do not think so. I do not think there would be anything against the interests of justice about it, but where the prosecution is handled by the assistant to the Department I shall give him the opportunity of discussing it with his superior in order to consider any recommendations he desires to make. I think that is the appropriate thing to do.

How much time?

Mr. Burchill: Tomorrow morning will be all right.

The Court: Can you see them this afternoon? Mr. Burchill: Will you give me 15 minutes?

The Court: Suppose we pass the matter until 4:15.

Mr. Burchill: Yes.

(Adjourned to 4:15 p.m.)

# [fol. 122] DEFENDANT'S REQUEST TO CHARGE

(Defendant William Shapiro respectfully asks the Court to charge as follows):

- 1. A conviction cannot be had upon strong suspicion or probabilities of guilt, nor as in civil cases upon a mere preponderance of evidence, but guilt must be established beyond a reasonable doubt.
- 2. While evidence of a crime may be circumstantial and inferential in its character, it must always rise to that degree of convincing power which satisfied the mind beyond a reasonable doubt of guilt. This can never be the case when the evidence which is produced is entirely consistent with innocence in a given transaction.
  - 3. The defendant is presumed to be innocent until his guilt has been established beyond a reasonable doubt.
- 4. Evidence to warrant conviction must, when considered by the jury, exclude beyond a reasonable doubt every other hypothesis than that of defendant's guilt.
- 5. The defendant is innocent of the charges against him alleged in the informations unless proven to be guilty by the Government beyond a reasonable doubt. The burden of proving the guilt of the defendant is on the Government; that burden never shifts; the defendant need not prove his innocence; that the burden is with the Government to prove beyond a reasonable doubt that the defendant did affirmatively compel his customers to purchase from him or from his salesmen plentiful commodities as a condition before selling them scarce commodities.
- 6. The mere refusal by the defendant to sell to any of his customers a scarce commodity or any commodity is in [fol. 123] itself no violation of the Emergency Price Control Act. Only if the sale of such scarce commodity is accompanied by coercion to purchase in combination with the sale of such scarce commodity a plentiful commodity does a violation occur.

"Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

7. There was evidence introduced as to the established custom and practice of the wholesale produce business, a usual method of selling scarce commodities in combination with plentiful commodities at certain seasons of the year. The mere selling of a scarce commodity in combination with a plentiful commodity is not a violation of the law.

"The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

- 8. I charge you as a matter of law that the powers granted by Congress to the Office of Price Administration by the Emergency Price Control Act were not to be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirma[fol. 124] titlely found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.
- 9. I charge you that there has been no evidence introduced by the Government to the effect that the Price Administrator has found affirmatively that the custom and practice in the produce industry requiring a customer to purchase a plentiful commodity as a condition of the sale to such customer of a scarce commodity, had the effect of circumvention or evasion of any regulation, order, price schedule or requirement of the Emergency Price Control Act, and therefore, if you find that the tie-in sales testified to by witnesses for the Government were the result of a long established custom and practice in the wholesale produce industry, such sales were not in violation of the Emergency Price Control Act and the defendant must be acquitted.

10. The mere fact that any of the witnesses for the Government believed that in order to purchase a scarce

commodity they would have to purchase a plentiful commodity as a condition, and acted in that belief, is not sufficient to spell out a violation of the law.

- 11. The defendant William Shapiro is accused of having evaded the provisions of Revised Maximum Price Regulation No. 426, by demanding, making and requiring certain merchants to purchase a commodity which was plentiful at that time as a condition of the sale to these merchants, and as an integral part thereof, of another commodity which was scarce. It is my duty to instruct you that if the evidence fails to establish beyond a reasonable doubt that any of these merchants, in order to obtain the [fel. 125] purchase of the scarce commodities, were required, compelled and coerced by the defendant William Shapiro to purchase the plentiful commodities, then it is your duty to find the defendant William Shapiro not guilty.
- doubt, that any of the merchants who testified were required, compelled and coerced by the said William Shapiro to purchase plentiful commodities in order to acquire scarce commodities, then it is your duty to inquire further whether the said requirement and compulsion resulted in the payment by any of these merchants of a price in excess of the maximum price permitted to be charged under the Price Control Regulations for any of these commodities. Unless you find beyond a reasonable doubt that as a result of said requirement and compulsion the merchants who testified, or any of them paid and the defendant William Shapiro received for the said commodities a price in excess of the said maximum price, it is your duty to find the defendant not guilty.
- 13. There was evidence received of certain conversations had between the witnesses who testified for the Government and sal-sman employed by the defendant William
  Shapire. I charge you as a matter of law that unless you
  find beyond a reasonable doubt that the defendant William
  Shapiro specifically instructed any of his salesman to require, compel and coerce any of the merchants who testified, to purchase a plentiful commodity in order to obtain
  the purchase of a scarce commodity, and unless you further find that the said requirement and compulsion resulted in the payment by the merchants who testified for

the Government, or any of them, to the defendant William Shapiro of a price in excess of the maximum price per[fol. 126] mitted to be charged under the Price Control Regulations, then such conversation between the salesman and the particular merchant is not binding upon the defendant William Shapiro and it is your duty to find the defendant not guilty in connection with any such transactions.

- 14. The denial by the Court of the motions to dismiss the information at the close of the Government's case and at the close of the entire case is not to be taken by the jury as an indication of the guilt or innocence of the defendant. The Court has no opinion as to the guilt or innocence of the defendant, and expresses no opinion with reference to the same. The denial of such motions was merely denial of motions upon questions of law.
- 15. If the jury finds that a witness testified falsely to any material fact, they have a right to disregard that part of the testimony which they find to be untrue and accept the balance of the testimony that they believe, or they have the right in such a situation to disregard all of the testimony of such a witness, irrespective of whether or not they believe some part or parts of it.
- 16. The return of informations against the defendant is no evidence whatever of guilt. The presumption of innocence means that at the beginning of the trial he is innocent of the charges, and that presumption continues to abide with him as a complete protection, unless and until it gives way because inconsistent with the existence of a situation proved by the evidence in the case beyond all reasonable doubt.
- 17. There is required such proof as would satisfy the judgment and consciences of the jury that the crime charged [fols. 127-128] had been committed by the defendant, and so satisfy them as to leave no other reasonable conclusion possible.

And, if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you then have a reasonable doubt and must acquit.

18. Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the jury to acquit.

- 19. As the verdict of the jury must represent the real opinion and judgment of each member of the jury, no juror should acquiesce in the verdict against his individual judgment.
- 20. The jury in determining the guilt or innocence of the defendant of the offense charged in the informations, can consider only the evidence of the case and are to disregard any statement made during the course of the trial by counsel, not supported by evidence, and they are not to be influenced or governed by any expression of opinion or action of counsel, unless the same can be deduced from the evidence.
- 21. The defendant has offered evidence of good character. Good character in itself may generate a reasonable doubt, sufficient to warrant a finding of not guilty.

## GOVERNMENT'S EXHIBIT 12.

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WILLIAM SHAPIRO.

Commission Merchants FRUITS AND PRODUCE 364 WASHINGTON STREET

D'AVIEC BRO

AUG 20 1943

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DEC



## COVERNMENT'S EXHIBIT 13.

WILLIAM SHAPIRO.

Commission Merchanis

FRUITS AND PRODUCE

364 WASHINGTON STREET

SOLD TO

D'AVINU SRDS

TERMS NET CASH BILLS MADE WEEKLY

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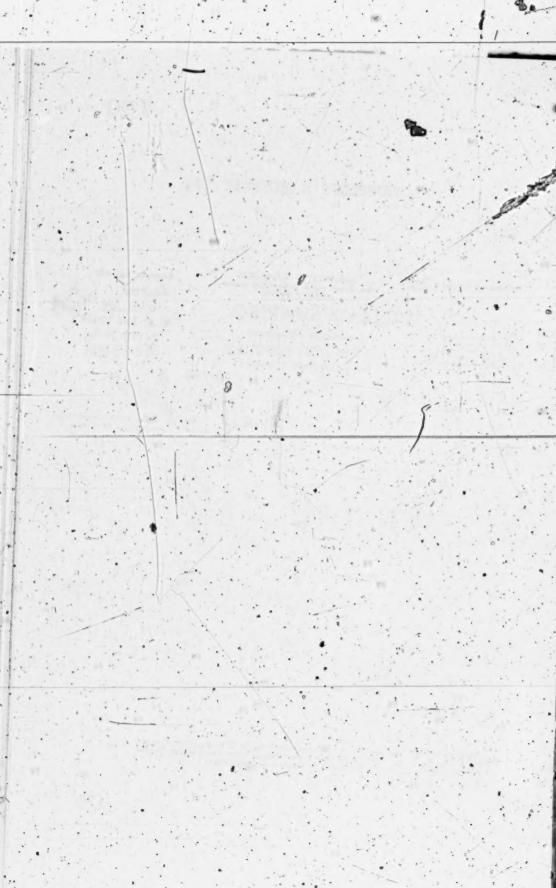
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GOVERNMENT'S EXHIBIT 14.

WILLIAM SHAPIRO.

Commission Merchants FRUITS AND PRODUCE 364 WASHINGTON STREET

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## GOVERNMENT'S EXHIBIT 15.

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Price Tickets may be obtained from selection at time of purchase.

WILLIAM SHAPIRO

Commission Merchani
FRUITS AND PRODUCE

364 WASHINGTON STREET

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SOLD TO

D'AVINO BROS

TERMS: NET CASH. BILLS MUST SE PAID WESHLY

10PERSIANS

3 50 35 00 5 29 31 74 66 740

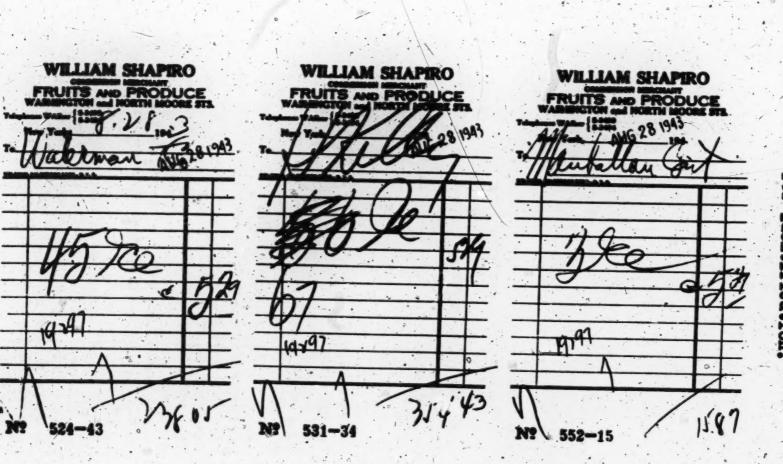
DEC.

NOTICE:



## GOVERNMENT'S EXHIBIT 16.

POS-TIVELY NO ALLOWANCES Price Tichets may be obtained from sales at time of purchase. WILLIAM SHAPIRO Commission Merchant FRUITS AND PRODUCE . 364 WASHINGTON STREET NEW YORK II. N. D. 12 1945 SOLD TO D'AV'NO BROS 10 CELERY 5 LETTUCE 2 CARROTS NOTICE:



For Identification.



## [fol. 135] IN UNITED STATES DISTRICT COURT

## [Title omitted]

### MOTION FOR ARREST OF JUDGMENT

Comes now William Shapiro the defendant in the above named cause and moves this Honorable Court in arrest. of judgment for the following reasons, to wit:

First: That the counts 7, 8, 9, 10 and 11 of the above numbered Information, upon which the defendant was tried and convicted, do not state sufficient facts to constitute a crime against the United States.

Second: That upon the face of the record the defendant is not guilty of the crime charged in counts 7, 8, 9, 10 and 11 of the within Information.

Third: That the record decisively establishs that there was such a fatal variance of proof in that the defendant did not compel, demand and require the witness D'Avino, as charged in counts 7, 8, 9, 10 and 11, to purchase a plentiful commodity as a condition and integral part for the sale of a scarce commodity.

[fol. 136] Fourth: That there is no evidence, direct or inferential, that the defendant William Shapiro violated any provisions of the Emergency Price Control Act of 1942, or did anything to bring about an evasion of the price limitations covering the commodities referred to in counts 7, 8, 9, 10 and 11 of this information.

Fifth: That the uncontradicted evidence shows that the witness D'Avino admitted that he was at liberty to return any and all of the commodities which he purchased and which are referred to in counts 7, 8, 9, 10 and 11, thus nullifying any contention on the part of the Government that the witness D'Avino was compelled and required to purchase the said commodities as alleged in counts 7, 8, 9, 10 and 11.

Sixth: That the uncontradicted evidence shows that the price- charged by the defendant William Shapiro, to the witness D'Avino, for the commodities referred to in counts 7, 8, 9, 10 and 11 of the Information, were at ceiling or below the ceiling price and therefore the sale of these com-

modities in combination did not constitute an evasion of MPR #426, subdivision 11.

Wherefore, defendant prays for the arrest of judgment as to counts 7, 8, 9, 10 and 11 of the Information herein.

Dated: New York, December 19th, 1945.

Curran & Stim, Attorneys for Defendant, Office & P. O. Address, 29 Broadway, New York City.

## [fol. 137] IN UNITED STATES DISTRICT COURT

#### [Title omitted]

#### MOTION FOR A NEW TRIAL

Comes now William Shapiro, defendant above named and moves this Honorable Court to grant him a new trial in the above cause for the following reasons, to wit:

- 1. That the verdict of the jury on counts numbered 7, 8, 9, 10 and 11 of the above numbered Information is contrary to the law.
- 2. That the verdict of the jury on counts numbered 7, 8, 9, 10 and 11 is contrary to the evidence.
- 3. That there was no sufficient competent evidence to support the verdict of the jury on counts numbered 7, 8, 9, 10 and 11.
- 4. That the Court erred in refusing to grant the prayer of the defendant to dismiss counts numbered 7, 8, 9, 10 and 11 of the Information at the close of the Government case, as well as at the end of the entire case.
- [fol. 138] 5. That the Court erred in refusing to direct the jury to return a verdict of not guilty as to counts numbered 7, 8, 9, 10 and 11 upon the ground that the defendant was prejudiced in his substantial rights:
- (a) By the failure of the Government to prove the regulation which is the basis of this information, to wit: MPR #426, subdivision 11.
- (b) By the failure of the Government to establish that the defendant required and compelled the witness, D'Avino

to purchase certain commodities as a condition of and as an integral part of the sale to him of certain other commodities as mentioned in the said counts numbered 7, 8, 9, 10 and 11.

- (c) By the failure of the Government to prove the ceiling price of the commodities mentioned in the said aforementioned counts.
- (d) By the failure of the Government to prove that the sale of plentiful commodities in combination with and as a condition of the sale of the scarce commodities referred to in counts 7, 8, 9, 10 and 11 constituted an evasion of price limitations as fixed by the said MPR #426.
- (e) By the failure of the Government to prove the prices which it is alleged the defendant evaded by the sale of the said aforementioned commodities.
- 6. That the Court erred by the failure to permit the defendant to introduce evidence of other sales made to other customers on the same day as alleged in counts 7, 8, 9, 10 [fol. 139] and 11, to establish that the scarce commodities were sold to other customers on these days without the requirement or compulsion to purchase plentiful commodities as an integral condition of same.
- 7. That the Court erred in refusing the defendant's offer to introduce evidence as to the custom and practice of the fresh fruit and produce industry, which, if allowed would have established that the regulation in question which is the subject matter of the said aforementioned counts was used or made to operate to compel changes in the business practices, cost practice or methods or means or aids to distribution established in the said industry without a prior affirmative finding by the Administrator that the said regulation was necessary to prevent circumvention or evasion of any regulation, order, price schedule or requirement under the provisions of the Emergency Price Control Act.
- 8. That the Court erred in charging the jury that the opportunity to dispose of a plentiful commodity together with a scarce commodity, constituted an advantage to the defendant and a violation of the War Emergency Price Control Act, as well as MPR #426, subdivision 11, which was the subject matter of the information.

Jan Taranta

- 9. That the Court erred in refusing the defendant's request to charge the jury:
- (a) That a conviction cannot be had upon strong suspicion or probabilities of guilt, nor as in civil cases upon a mere preponderance of evidence, but guilt must be established beyond a reasonable doubt.
- (b) That the mere refusal by the defendant to sell to any of his customers a scarce commodity or any commodity [fol. 140] is in itself no violation of the Emergency Price Control Act. Only if the sale of such scarce commodity is accompanied by coercion to purchase in combination with the sale of such scarce commodity a plentiful commodity does a violation occur.
- (c) That the powers granted by Congress to the office of Price Administration by the Emergency Price Control Act were not to be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.
- (d) That the mere fact that any of the witnesses for the Government believed that in order to purchase a scarce commedity they would have to purchase a plentiful commodity as a condition and acted in that belief, is not sufficient to spell out a violation of the law.
- (é) That the defendant, William Shapiro, is accused of having evaded the provisions of Revised Maximum Price Regulation No. 426, by demanding, making and requiring certain merchants to purchase a commodity which was plentiful at that time as a condition of the sale to these merchants, and as an integral part thereof, of another commodity which was scarce; that if the evidence fails to establish beyond a reasonable doubt that any of these merchants, in order to obtain the purchase of the scarce commodities, were required, compelled and coerced by the defendant William Shapiro, to purchase the plentiful commodities, then it is their duty to find the defendant William Shapiro, not guilty.

[fol. 141] (f) That if the jury finds from the evidence, beyond a reasonable doubt, that any of the merchants who testified were required, compelled and coerced by the said William Shapiro, to purchase plentiful commodities in order to acquire scarce commodities, then it is their duty to inquire further whether the said requirement and compulsion resulted in the payment by any of these merchants of a price in excess of the maximum price permitted to be charged under the Price Control Regulations for any of these commodities; that unless they find beyond a reasonable doubt that as a result of said requirement and compulsion the merchants who testified, or any of them paid and the defendant William Shapiro received for the said commodities a price in excess of the said maximum price, it is their duty to find the defendant not guilty.

(g) That if the jury finds that a witness testified falsely to any material fact, they have a right to disregard that part of the testimony which they find to be untrue and accept the balance of the testimony that they believe, or they have the right in such a situation to disregard all of the testimony of such a witness, irrespective of whether or not they believe some part or parts of it.

Wherefore, the defendant William Shapiro prays that the Court set aside the verdict of the jury as to counts 7, 8, 9, 10 and 11 and grant the defendant

8, 9, 10 and 11 and grant the defendant a new trial.

Dated: N. Y., December 19th, 1945.

Curran & Stim, Attorneys for Defendant, Office & P. O. Address, 29 Broadway, New York City.

[fol. 142] IN UNITED STATES DISTRICT COURT

C. 119-147

UNITED STATES OF AMERICA,

VS.

#### WILLIAM SHAPIRO

OPINION OF FORD, J., DENYING MOTIONS IN ARREST OF JUDG-MENT AND FOR A NEW TRIAL

New York, January 2, 1946;

10:00 a. m.

Before :- Hon. H. Church Ford, District Judge.

Present:—Thomas F. Burchill, Jr., Esq., Assistant U. S. Attorney.

Menahem Stim, Esq., for Defendant.

(Statement by Mr. Stim on behalf of the defendant.)
(Statement by Mr. Burchill on behalf of the Government.)

The Court: I have read your briefs, with much interest;

both your arguments as well as your citations.

I have received a copy of the recent opinion of Judge Simons of the Sixth Circuit. Of course, I recognize that a decision of the Sixth Circuit is binding only in the Sixth Circuit, but it is an interesting and persuasive commentary on the meaning of that rather strange provision of [fol. 143] the amendment of 1944, which provided that agencies or officers of the Government exercising supervisory or policy-making authority over the Office of Price Administration shall not be subject to the provisions of the Federal Register Act other than the requirement to publish their orders or regulations. Judge Simons' interpretation is that the exception refers to those supervisory powers above and over the Administrator of the OPA. I don't know whether he has correctly interpreted the intention of Congress or not. I am familiar with his work in the Sixth Circuit and I would be inclined to agree with him if we were limited to that basis for determining this motion. You gentlemen have proceeded upon the idea that

judicial notice of these requirements is entirely dependent on the operative effect of the Federal Register Act. As a matter of fact, gentlemen, judicial notice of such regulations was taken by the courts years before there was any such thing as a Federal Register Act—not these particular regulations, because these regulations were not in effect, but regulations of a similar nature. It has been established law for almost a century, as pointed out in the old case of Caha v. United States, with which you are familiar, 152 U. S. 211, 221, 1894. The Court said in that case:

"Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is inter[fol. 144] ested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

The distinguished justice who wrote that opinion in the Caha case cited a number of cases, all of which I have examined. Some are squarely in point, some seem a little difficult to find how they were in point, but taking the Caha case back in 1894, referring back to those old cases beginning in 1859 and since that time, the rule has been universally followed that regulations authorized by Congress became part of the law of the country to be followed by the Courts.

Later came this case of Thornton v. United States, 271 U. S. 414, in which the Secretary of Agriculture had prescribed certain rules and regulations with regard to the quarantining of diseased animals. Certain regulations required inspection and certain particular methods of disinfecting them, dipping animals. The regulations were as detailed as any you could imagine. The Supreme Court made this statement:

"Under date of June 15, 1916, various regulations were issued by the Secretary of Agriculture. They

are not printed in the record, they are matters of which we may take judicial notice,"

citing Caha v. United States as authority.

I notice a rather interesting commentary on the same subject by the Second Circuit in the famous Schechter case. You remember the Schechter case involved rules and reg-[fol. 145] ulations that were part of the Code of the City. The opinion of the Second Circuit Court of Appeals makes this statement—the case did not go up to the Supreme Court on that point, it went on another point—the authority to delegate such unlimited powers to the executive without appropriate standards by which they should be controlled, but this is what the Circuit Court said in regard to judicial notice of these regulations:

"Error is assigned for the refusal to sustain the demurrer to counts 4, 5, and 60 because ordinances and regulations of the City of New York therein referred to were not pleaded. Section 22 of the Code prohibits the sale of live poultry which has not been inspected and approved in accordance with the rules, regulations or ordinances of the particular area. These counts deal with this subject without reference to the particular previsions of the City ordinances. Judicial notice may be taken of these provisions by the court,"

citing a number of cases.

"The Poultry Code which will be judicially noticed by this court. (Thornton v. United States) contemplates inspection in accordance with the Sanitary Code (Sec. 22). Since judicial notice is taken, it was unnecessary to plead such laws."

That was the commentary of the Second Circuit before we had any Federal Register Act.

In Sommer v. E. B. Kelly Company, 47 N. Y. S. (2d) 57, the Court said:

[fol. 146] "The said Act, the rulings and the ceiling prices fixed pursuant to its provisions constitute the law. The Court will take judicial notice of said law."

In United States v. Lederer, 140 Fed (2d) 136, to which reference has been made and which Mr. Stim commented

upon as being prior to the passage of the amendment to the Federal Register Act, Judge Evans in commenting upon the established law prior to the Federal Register Act, and after quoting the Federal Act, stated:

'Aside from this statutory provision the rule seems to be well settled as stated in 20 American Jurisprudence, 67, 68:

"The courts also take judicial notice of the official acts of the heads of the executive departments of the Federal Government of public notoriety or general public interest, but not of departmental acts having no such character."

"As to judicial notice by courts of regulations of the Government, even though not specifically introduced in proof,"

citing many cases.

So it seems to me, gentlemen, we are not dependent upon the Federal Register Act for the authority to take judicial notice of these regulations, whatever may be our view as to the Sixth Circuit Court's opinion, with which, however, I am in full accord.

I call your attention to the case of *United States* v. Fried, 149 Fed. (2d) 1011, which was decided by the Second Circuit on June 21, 1945, in which your Circuit considered an OPA regulation.

[fol. 147] The Court said:

"The regulations do not so provide."

Then, after pointing out what the regulations were, the Court said:

"Since the court could take notice of the regulations, the proof, as finally made, was competent and complete, " • ""

Whatever may be the interpretation of the Federal Register Act, my opinion is that it merely broadens the scope of judicial notice. Prior to the Federal Register Act, judicial notice was confined to executive proclamations, rules and regulations which were of general public interest, but did not reach to inter-departmental regulations.

The Federal Register Act goes further than that,—anything lawfully published in the Register, whatever it may be, is open to judicial notice.

Judicial notice of the regulations that are involved here has been the established law, it seems to me, for many, many years, and is still the law. I think, therefore, I shall have to overrule the motion for a new trial. Prepare your order accordingly.

Mr. Stim: May I have an exception.

The Court: Surely.

[fol. 148] IN UNITED STATES DISTRICT COURT

## [Title omitted]

ORDER DENYING MOTION FOR NEW TRIAL January 2, 1946

A motion having come on to be heard before me for a new trial in the above entitled action now after hearing Curran and Stim, Menahem Stim, of counsel, attorney for said defendant in favor of said motion, and John F. X. McGohey, United States Attorney for the Southern District of New York, Thomas F. Burchill, Jr., Assisant United States Attorney of counsel in opposition thereto.

Upon motion of John F. X. McGohey, United States Attorney, it is

[fol. 149] Ordered that said motion is hereby denied, and it is

Further Ordered that the sentence imposed which is a total fine of \$5,000 be paid on or before January 7, 1946.

H. Church Ford, United States District Judge.

#### IN UNITED STATES DISTRICT COURT

#### [Title omitted]

#### NOTICE OF APPEAL

The name and address of the appellant is as follows:

William Shapiro, whose business address is 364 Washington Street, New York, N. Y., and whose home address is 3599 Bedford Avenue, Brooklyn, New York.

The attorneys for the appellant are Curran & Stim, Esqs., Menahem Stim, Esq., of Counsel, 29 Broadway, New York, N. Y.

[fol. 150] The defendant-appellant was charged on forty-eight separate counts of the Information with having violated on forty-eight separate dates, Title 50 Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders adopted and issued thereunder, and more particularly, Maximum Price Regulation No. 426. The full particulars of the several counts in the Information are referred to in the original Information now on file in the office of the Clerk of this Court.

The Information herein was returned during the December 1944 Term of this Court. The case was tried before Hon. H. Church Ford, District Judge, and a jury, and the verdict of guilty on Counts 7-8-9-10 and 11 of the Information was rendered on December 18th, 1945. Sentence was imposed by the District Judge on December 18th, 1945, as follows:

One thousand (\$1,000.00) Dollars fine on each of the five counts in the Information on which a verdict of guilty was rendered, making a total fine in the sum of Five thousand (\$5,000.00) Dollars.

On the 19th day of December, 1945, the defendant-appellant made a due and timely motion for a new trial before the United States District Court setting forth numerous grounds in support of the motion. On January 2nd, 1946 the Honorable H. Church Ford rendered his decision denying the motion and an order denying the motion was entered and filed in the office of the Clerk of this Court on January 3rd, 1946.

I, the undersigned, William Shapiro, the above named appellant, do hereby appeal to the United States Circuit

Court of Appeals, for the Second Circuit, from the judgment entered in this Court on December 18th, 1945, and from the order denying the defendant-appellant's motion for a new [fol. 151] trial entered in this Court on the 3rd day of January, 1946.

Grounds of Appeal

- (1) That the Court has no jurisdiction over the defendant.
- (2) That the violation referred to in each of the counts of the Information herein could not be charged in an Information, and that the said charges could only be submitted to a Grand Jury duly constituted as provided by the Constitution of the United States.
- (3) That each of the counts in the Information herein, and particularly counts 7-8-9-10 and 11, did not state an offense under Title 50, Appendix, Section 901 et seq., United States Code, and the rules, regulations and orders adopted and issued thereunder, and particularly did not state an offense under Maximum Price Regulation No. 426;
- (4) That the Government did not prove the material allegations in each of the counts 7-8-9-10 and 11 of the Information herein necessary to sustain a conviction beyond a reasonable doubt;
- (5) That there was no sufficient competent evidence to support the verdict of the jury on counts numbered 7-8-9-10 and 11;
- (6) That the evidence adduced upon the trial did not establish that the defendant participated in a tying agreement within the purview of the prohibition contained in Maximum Price Regulation No. 426;
  - [fol. 152] (7) That the Court erred in receiving certain testimony over the objection of the defendant;
  - (8) That the verdict of the jury on counts numbered 7-8-9-10 and 11 of the above numbered Information is contrary to the law;
  - (9) That the verdict of the jury on counts numbered 7-8-9-10 and 11 is contrary to the evidence;
  - (10) That there was no credible evidence to prove any criminal intent or any intent to violate the statute under the Information so filed, and that therefore the District

Judge erred in submitting the case to the jury and in not either dismissing all of the several counts of the Information submitted to the jury, or directing the jury to bring in a verdict of acquittal;

- (11) That the Court erred in refusing to direct the jury to return a verdict of not guilty as to the counts numbered 7-8-9-10 and 11 upon the ground that the defendant was prejudiced in his substantial rights;
- (a) By the failure of the Government to prove the regulation which is the basis of this information, to wit: MPR #426, subdivision 11;
- (b) By the failure of the Government to establish that the defendant required and compelled the witness, D'Avino to purchase certain commodities as a condition of and as an integral part of the sale to him of certain other commodities as mentioned in the said counts numbered 7, 8, 9, 10 and 11;
- [fol. 153] (c) By the failure of the Government to prove the ceiling price of the commodities mentioned in the said aforementioned counts;
- (d) By the failure of the Government to prove that the sale of plentiful commodities in combination with and as a condition of the sale of scarce commodities referred to in counts 7-8-9-10 and 11 constituted an evasion of price limitations as fixed by the said MPR #426;
- (e) By failure of the Government to prove the prices which it is alleged the defendant evaded by the sale of the said aforementioned commodities;
- (f) By the failure of the Government to prove that regulation MPR #426, as well as the regulations fixing ceiling prices of the commodities mentioned in counts 7-8-9-10 and 11, were approved by the Secretary of Agriculture as required by Section 903, subdivisions (e) and (f) of the Emergency Price Control Act;
- 12. That the defendant having claimed immunity under the provisions of the Emergency Price Control Act of January 30, 1942, and particularly United States Code, title 50, section 922, as well as under the Compulsory Testimony Act of February 11, 1893 (United States Code 1934, title 49,

section 46) and under the Constitution of the United States, when subpoensed on or about October 4th, 1944 by the Enforcement Attorney of the Office of Price Administration to produce his books and records containing information, and give testimony concerning transactions later charged in the Information, and the defendant having been compelled to produce the aforesaid books and records, notwithstand-[fol. 154] ing his claim of immunity as aforesaid, the Court erred in refusing to grant the motion of the defendant to dismiss the Information at the close of the Government's case, as well as at the end of the entire case, on the ground that the defendant having affirmatively claimed immunity, acquired immunity under the aforesaid statutes.

- 13. That the Court erred in refusing the defendant's offer to introduce evidence as to the custom and practice of the fresh fruit and produce industry, which, if allowed would have established that the regulation in question which is the subject matter of the said aforementioned counts was used or made to operate to compel changes in the business practices, cost practice or methods or means or aids to distribution established in the said industry without a prior affirmative finding by the Administrator that the said regulation was necessary to prevent circumvention or evasion of any regulation, order, price schedule or requirement under the provisions of the Emergency Price Control Act.
- 14. That the Court erred in charging the jury that the opportunity to dispose of a plentiful commodity together with a scarce commodity, constituted an advantage to the defendant and a violation of the War Emergency Price Control Act, as well as MPR # 426, subdivision 11, which was the subject matter of the information.
- 15. That the Court erred in refusing the defendant's request to charge the jury:
- (a) That a conviction cannot be had upon strong suspicion or probabilities of guilt, nor as in civil cases upon [fol. 155] a mere preponderance of evidence, but guilt must be established beyond a reasonable doubt;
- any of his customers a scarce commodity or any commodity is in itself no violation of the Emergency Price

- is accompanied by coercion to purchase in combination with the sale of such scarce commodity a plentiful commodity does a violation ocur;
  - (c) That the powers granted by Congress to the office of Price Administration by the Emergency Price Control Act were not to be used or made to operate to compelchanges in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act;
- (d) That the mere fact that any of the witnesses for the Government believed that in order to purchase a scarce commodity they would have to purchase a plentiful commodity as a condition and acted in that belief, is not sufficient to spell out a violation of the law.
- (e) That the defendant, William Shapiro, is accused of having evaded the provisions of Revised Maximum Price Regulation No. 426, by demanding, making and requiring certain merchants to purchase a commodity which was plentiful at that time as a condition of the sale to these merchants, and as an integral part thereof, of another [fol. 156] commodity which was scarce; that if the evidence fails to establish beyond a reasonable doubt that any of these merchants, in order to obtain the purchase of the scarce commodities, were required, compelled and coerced by the defendant William Shapiro, to purchase the plentiful commodities, then it is their duty to find the defendant William Shapiro, not guilty;
- (f) That if the jury finds from the evidence, beyond a reasonable doubt, that any of the merchants who testified were required, compelled and coerced by the said William Shapiro, to purchase plentiful commodities in order to acquire scarce commodities, then it is their duty to inquire further whether the said requirement and compulsion resulted in the payment by any of these merchants of a price in excess of the maximum price permitted to be charged under the Price Control Regulations for any of these commodities; that unless they find beyond a reason-

able doubt that as a result of said requirement and compulsion the merchants who testified, or any of them paid and the defendant William Shapiro received for the said commodities a price in excess of the said maximum price, it is their duty to find the defendant not guilty;

(g) That if the jury finds that a witness testified falsely to any material fact, they have a right to disregard that part of the testimony which they find to be untrue and accept the balance of the testimony that they believe, or they have the right in such a situation to disregard all of the testimony of such a witness, irrespective of whether or not they believe some part or parts of it.

[fol 157] 16. That the District Judge erred in overruling defendant's motion to set aside the verdict of the jury.

17 That the District Judge erred in denying the motion for a new trial.

Dated, New York, January 4th, 1946.

William Shapiro, Appellant.

#### [fol. 158] IN UNITED STATES DISTRICT COURT

## STIPULATION SETTLING BILL OF EXCEPTIONS

\*It is hereby stipulated by and between the attorneys for the respective parties herein that the foregoing bill of exceptions contains all the evidence, exhibits and proceedings had upon the trial of this action, as agreed upon by the parties, and that the same may be settled and ordered filed.

Dated: New York City, September 12, 1946.

Curran & Stim, Attorneys for Defendant-Appellant. John F. X. McGohey, United States Attorney, Attorney for Appellee.

#### IN UNITED STATES DISTRICT COURT

## ORDER SETTLING BILL OF EXCEPTIONS

On the foregoing stipulation, the foregoing bill of exceptions containing all of the evidence, exhibits and proceedings had upon the trial of this action, as agreed upon by and

between the parties, is hereby settled and ordered on file in the office of the Clerk of the District Court of the United States in and for the Southern District of New York.

Dated: New York City, September 16, 1946.

J. Waties Waring, U. S. D. J.

[fol. 159] IN UNITED STATES DISTRICT COURT

[Title omitted]

#### STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated: New York City, September 12, 1946.

Curran & Stim, Attorneys for Defendant-Appellant.

John F. X. McGohey, United States Attorney for the Southern District of New York, Attorney for Appellee.

#### IN UNITED STATES DISTRICT COURT

#### ORDER FILING RECORD

On the consent of the attorneys for the respective parties, the foregoing printed record is hereby ordered filed in lieu of the original record for the purpose of certifying the record on appeal.

Dated: New York City, September 16, 1946.

J. Waties Waring, U. S. D. J.

[fol. 160] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 161] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1946

No. 93

(Argued December 11, 1946. Decided February 7, 1947)

Docket No. 20366

UNITED STATES OF AMERICA, Plaintiff-Appellee,

WILLIAM SHAPIRO, Defendant-Appellant.

Before Swan, Augustus N. Hand and Clark, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

William Shapiro was convicted of violating maximum price regulations established under the Emergency Price Control Act of 1942, 50 U.S. C. A. App. § 901 et seq., and he appeals. Affirmed.

[fol. 162] Menaheim Stim, of New York City (Curran & Stim, of New York City, on the brief), for defendant-appellant.

John J. Donovan, Jr., Asst. U. S. Atty., of New York City (John F. X. McGohey, U. S. Atty., of New York City, on the brief), for plaintiff-appellee.

#### OPINION .

CLARK, Circuit Judge:

Defendant, a wholesaler of fruit and produce, was convicted of violating price control regulations by requiring a customer to purchase other produce along with lettuce. On this appeal he contests a conviction absent proof of violation of ceiling prices; but we have held proof of a tie-in sale alone sufficient to convict under this self-same regulation. United States v. George F. Fish, Inc., 2 Cir., 154 F. 2d 798, certiorari denied George F. Fish, Inc., v. United States, 66 S. Ct. 1377. Certain other assigned errors canbe summarily dismissed. The regulation was duly pub-

lished in the Federal Register; 1 and in any event the court properly took judicial notice of it without formal proof. Caha v. United States, 152 U. S. 211, 221, 222; Thornton v. United States, 271 U. S. 414, 420. Defendant's offer to prove that on occasions other than those charged he sold lettuce without tie-in with other vegetables was properly rejected, as the evidence was irrelevant. 1 Wigmore on [fol. 163] Evidence, 3d Ed. 1940, § 195, pp. 665, 666; State v. Fêrguson, 71 Conn. 227, 41 A. 769. And the evidence of the customer D'Avino of the five tie-in sales to him was sufficient to justify the jury's verdict, even against his own de-This leaves as the substantial and important question defendant's claim that the prosecution violates his constitutional and statutory immunity because the leads from which it developed were obtained from his books, produced by him in obedience to a subpoena issued by the Price Control Administrator.

The subpoena of the Administrator had required defendant to produce his sales records for September, 1944, at the local price control office. The Administrator, by a previous valid regulation, § 14 of Art. 2 of § 1439 of MPR 426, had required such records to be kept by persons of defendant's trade status. When defendant appeared with his books he asked what immunity he would receive and was told he would be given whatever immunity flowed as a matter of law from the production of the books. He then made formal claim for constitutional and statutory immunity, and handed over the books. Obtaining the names of customers from these books the price control officials discovered through investigation that D'Avino was prepared to testify as to tie-in sales as of an earlier period, namely, August, September, and November, 19.3.

Defendant bases his claim to immunity on the Fifth Amendment and on § 202(g) of the Emergency Price Control Act, 50 U. S. C. A. App. § 922(g), which is as follows: "No person shall be excused from complying with any requirements under this section because of his privilege

<sup>&</sup>lt;sup>1</sup> As originally issued in 1943, MPR 426 was published in 8 F. R. 9546, 10571; it was frequently amended in details, all likewise published as cf. Amt. 193, Oct. 1, 1946, in 11 F. R. 11199, and earlier references there and in 32 CFR, 1943 Supp. 1535, 1944 Supp. 2821, 1945 Supp. 3413.

against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with [fol. 164] respect toany individual who specifically claims such privilege. 112 The Compulsory Testimony Act provides in substance that no person shall be excused from testifying or producing books in response to a subpoena or otherwise in proceedings before the Interstate Commerce Commission or for violation of the Interstate Commerce Act on the ground that the evidence, documentary or otherwise, "may tend to criminate him or subject him to a penalty or forfeiture"; but he shall not be prosecuted or subjected to any penalty or forfeiture "on account of any concerning which he may testify, or transaction produce evidence" in response to subpoena or otherwise. 49 U. S. C. A. 646.

It was settled by Wilson v. United States, 221 U. S. 361, Ann. Cas. 1912D, 558, that the constitutional immunity does not attach to records required by law, for these are public documents. But defendant says that even if the distinction is drawn between required and voluntary records in the cases arising under the fifth Amendment, no such distinction is warranted under the terms of the presently applicable statute. For that grants immunity for compliance "with any requirements under this section," that is, with all requirements of the lengthy section, including subsection (b); which is the Administrator's grant of authority for requiring the keeping of the records in question. He urges that this shows a congressional intent to extend immunity to the production of required as well as nonrequired records. [fol. 165] For otherwise the Administrator would have

<sup>&</sup>lt;sup>2</sup> Many regulatory statutes confer broad record-requiring powers upon administrative agencies and contain immunity clauses similar to this one. Among these are Securities Exchange Act of 1934, 15 U.S. C. A. §§ 78q, 78u(d); National Labor Relations Act, 29 U.S. C. A. §§ 156, 161; Public Utility Holding Company Act of 1935, 15 U.S. C. A. §§ 79o(c), 79r(c), 79r(e); Federal Power Act, 16 U.S. C. A. §§ 825a, 825f(g); Civil Aeronautics Act of 1938, 49 S. C. A. §§ 425(a), 644; Fair Labor Standards Act of 1938, 29 U.S. C. A. §§ 209, 211, 49 U.S. C. A. §§ 49, 50; Second War Powers Act of 1942, 50 U.S. C. A. App. §§ 633(3), 633(4).

the power to render the immunity provision quite inoperative and meaningless by merely imposing broad record-keeping requirements on the businesses within his field of operations. Moreover, as he urges, the statute is constitutional only if it affords a protection as broad as that of the Fifth Amendment, Counselman v. Hitchcock, 142 U. S. 547; Brown v. Walker, 161 U. S. 591; Glickstein v. United States, 222 U. S. 139, which will not be the case if its coverage is dependent only on the will of the Administrator.

We have reached an opposite conclusion, however, by an examination of the settled construction of the constitutional privilege against self-incrimination and of the congressional intent granting broad record-requiring powers to the Price Administrator. The principle that the constitutional privilege against self-incrimination protects individuals against being forced to produce private documents for inspection, but not against being forced to produce public documents, is quite clear. Rodgers v. United States, 6 Cir., 138 F. 2d 992, 995, 996. The principle applies not only to public documents in public offices, but also to records required by the law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established." Wilson v. United States, supra, 221 U. S. 361, 380, Since the books here involved were such public documents, defendant had no constitutional privilege. Hence he gained statutory immunity only if statutory immunity is construed as being broader than constitutional privilege.

But the Compulsory Testimony Act, alone or, as here, incorporated in the Price Control Act, may not be so construed. The United States Supreme Court, speaking through Mr. Justice Holmes, has said: "But the obvious [fol. 166] purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction as coterminous with what otherwise would have been the privilege of the person concerned." Heike v. United States, 227 U. S. 131, 142. See also Grubb, J.'s opinion in United States v. Skinner, D. C. S. D. N. Y., 218 F. 870, 876. Therefore, if the witness has, as in this case, no constitutional privilege to relinquish, he gains no

immunity under the statute. By importing the Compulsory Testimony Act, with its settled judicial construction, into the Price Control Act, Congress indicated its intention to grant in that Act an immunity similarly limited. Amato v. Porter, 10 Cir., 157 F. 2d 719.

To hold that the statutory immunity aftaches only to private documents, and not to public documents, does not destroy the immunity clause of the Act. The immunity clause will apply to oral testimony given in hearings and investigations conducted by the Administrator. Bowles v. Trowbridge, D. C. N. D. Cal., 60 F. Supp. 48; United States v. Armour & Co., D. C. E. D. Pa., 64 F. Supp. 855. It will apply furthermore to documents the Administrator has subpoenaed, but which he had not required to be kept. In-[fol. 167] deed, to hold that the statutory immunity attaches to public documents would greatly decrease the utility of statutory provisions authorizing administrative agencies to require the keeping of records. The purpose of such authorizations is to aid administrative agencies in the investigation and prosecution of violators of the statutes entrusted to them for enforcement by making available to the agencies a body of public documents covering transactions under their jurisdiction.

But there is an even more compelling reason for thus construing the statute. It has now been made clear by authoritative rulings that the administrative agencies have no power to secure the documents, even though required

All the decisions to date but one have refused immunity to the production of required records under the price control regulations, usually discussing only the constitutional immunity, without separate reference to the statute. Amato v. Porter, 10 Cir., 157 F. 2d 719; Bowles v. Glick Bros. Lumber Co., 9 Cir., 146 F. 2d 566, 571, reversing Brown v. Glick Bros. Lumber Co., D. C. S. D. Cal., 52 F. Supp. 913. certiorari denied 325 U. S. 877; Bowles v. Stitzinger. D. C. W. D. Pa., 59 F. Supp. 94; Bowles v. Kirk, D. C. W. D. Pa., 59 F. Supp. 97; United States v. Kempe, D. C. N. D. Iowa, 59 F. Supp. 905; Bowles v. Chew. D. C. N. D. Cal., 53 F. Supp. 787. Of the cases which have also construed the statute, Bowles v. Seitz, D. C. W. D. Tenn., 62 F. Supp. 773, and Bowles v. Misle, D. C. Neb., 64 F. Supp. 835, are in accord with the views expressed here. In re Hoffman, D. C. D. C., 68 F. Supp. 53, is contra.

by law, through the process of a general search and seizure of a custodian's premises, but may obtain them only, if consent is not given, by a subpoena. This was so held in Bowles v. Beatrice Creamery Co., 10 Cir., 146 F. 2d 774. which was cited and followed in both Judge L. Hand's and Judge Frank's opinions in United States v. Davis, 2 Cir. 151 F. 2d 140; and these views, in turn, were approved by Mr. Justice Frankfu-ter for the dissenting justices in Davis v. United States, 66 S. Ct. 1256, and were not questioned by the majority. Indeed, the subpoena is the only remedy stated in the statute itself, \$\$202(b) and (c). Hence here the price officials were taking the statutory course, and the only legal course, against a refusal or the qualified refusal represented by the claim of immunity. To hold that the power to subpoena is subject to a grant of immunity from prosecution would thus destroy the only sure method by which the agencies may inspect the recorded in their enforcement duties. Such a holding would destroy the value of record-keeping requirements—which are unquestionably valid, United States v. Sullivan, 274 U. S. 259-by making their use dependent upon the waiver by suspected wrong-[fol. 168] doers of the privilege against self-incrimination. We cannot ascribe to Congress so capricious a graft of an important regulatory power.

Since this disposes of the appeal, we need not consider the further contention by the prosecution that, in any event, no immunity attaches to the production of the books by the defendant here because the connection between the books and the evidence produced at the trial was too tenuous to justify the claim.

Affirmed. .

[fol. 169] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES, Plaintiff-Appellee,

WILLIAM SHAPIRO, Defendant-Appellant

JUDGMENT—Filed February 7, 1947

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 170] (File endorsement omitted.)

[fol. 171] Clerk's certificate to foregoing transcript omitted in printing.

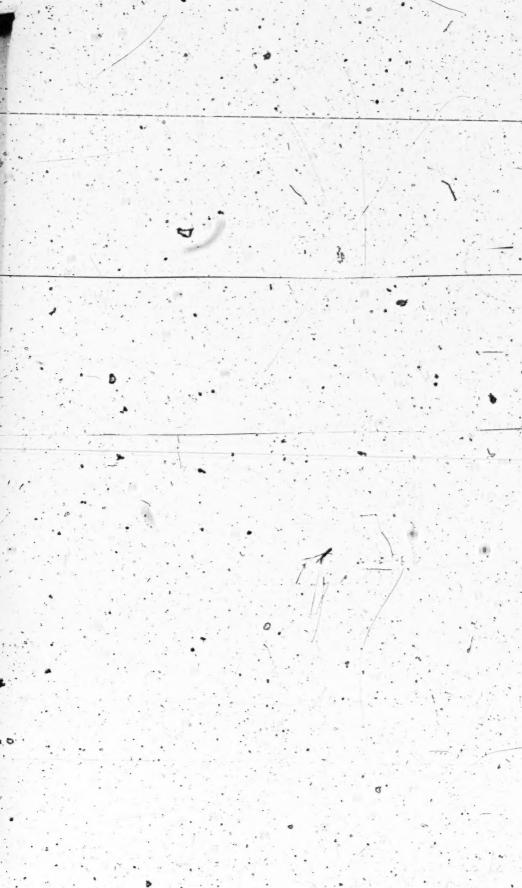
[fol. 172] SUPREME COURT OF THE UNITED STATES

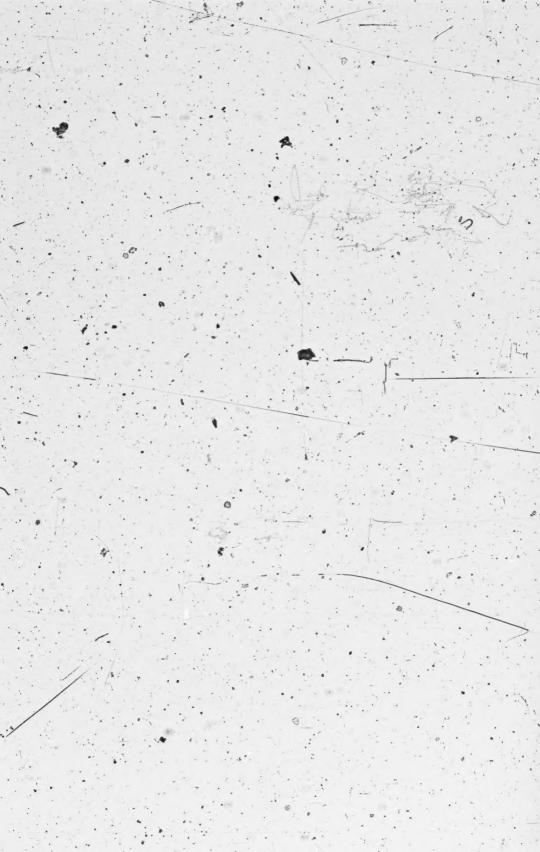
ORDER ALLOWING CERTIORARI-Filed June 2, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 51, 962. U. S. Circuit Court of Appeals, Second Circuit. Term No. 1098. William Shapiro, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed March 5, 1947. Term No. 1098 O. T. 1946.





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IN THE

# Supreme Court of the United States

March Term, 1947.

No Table

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WILLIAM SHAPIRO,

Petitioner.

AGAINST

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

CUERAN & STIM,
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MREARINE STIM,
Of Counsel.



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#### MISCELLANEOUS.



IN THE

# Supreme Court of the Anited States

MARCH TERM, 1947.

Ño.

WILLIAM SHAPIBO,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit
Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice of the Supreme Court of the United States of America and the Honorable Associate Justices Thereof:

Your petitioner, William Shapiro, respectfully submits this petition for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit, to review the decision and judgment of the United States Circuit Court of Appeals for the Second Circuit in the above cause, affirming a judgment of conviction of the petitioner in the District Court of the United States for the Southern District of New York, wherein the petitioner was convicted of violating Maximum Price Regulations established under the Emergency Price Control Act of 1942, 50 U. S. C. A. App. 901, et seq.

The judgment of the Circuit Court of Appeals affirming the conviction of the petitioner was entered on February 7th, 1947 (R. 505-507).

#### Opinions Below.

The District Court rendered no opinion. A written opinion, not yet officially reported, was rendered by the United States Circuit Court of Appeals (R. 481-503).

#### Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U.S. C., Sec. 347a), and as modified, pursuant to the Act of March 8, 1934 (18 U.S. C., Sec. 688), by Rule XI of the Rules of Practice and Procedure after verdict in criminal cases (292 U.S. 661, 666).

#### Questions Presented.

The petitioner, a wholesaler of fruit and produce, was convicted of violating Price Control Regulations by requiring a customer to purchase other produce along with lettuce. It was contended by the petitioner and not denied by the prosecution, that the leads which led to the obtaining of information that brought about the criminal prosecution were developed from books produced by the petitioner in obedience to the subpoena issued by the Price Control Administrator. The petitioner contends that since he, a personal defendant, affirmatively claimed his constitutional and statutory immunity, when over his protest he was forced to produce the books called for bythe Administrator's subpoens he was immune from prosecution, both under the provisions of the Immunity Section of the Emergency Price Control Act of January 30, 1942, and particularly U. S. C. Title 50, App. Sec. 922, as well as

the Constitution of the United States. The principal and sole questions therefore are:

- 1. Does Sec. 202 (g) of the Emergency Price Control Act (50 U. S. C. A. App. 922[g]) confer statutory immunity on one who is forced by the service of the Administrator's subpoena to produce under protest books and records required to be kept by Sec. 202(b) of the Emergency Price Control Act?
- 2. May it be contended that sales invoices, sales books, ledgers, individual records, contracts and records relating to the sale of commodities, ordinarily kept by the average businessman in the usual course of business, are not private but public documents, and the forced production of these records is not covered by the Immunity Provision of the Emergency Price Control Act Sec. 202(g)?
- 3. Is the constitutional immunity provided by the Fourth and Fifth Amendments of the United States Constitution co-extensive with the immunity provision of the Compulsory Testimony Act of February 11, 1893 (U. S. C. 1934, Ed. Title 49, Sec. 46), which is incorporated by reference in Sub-section g of Sec. 202 of the Emergency Price Control Act of 19424

#### Statement.

Prior to the trial, the petitioner moved on March 13th, 1945, by a Plea in Bar for the dismissal of the information on the ground that he had obtained immunity (R. 120-122).

The petitioner in support of that motion showed that on or about September 29th, 1944 (more than two months prior to the filing of the information) the petitioner was served with a subpoena Duces Tecum and Ad Testificandum issued by the Price Administrator, directing him

to appear before the Chief Enforcement Attorney for the Office of Price Administration on October 2nd, 1944, to testify concerning

> "all purchases and sales of fresh fruit and vegetables from Sept. 1, 1944 to Sept. 28, 1944;"

and to produce at that time

"all duplicate sales invoices, sales books, ledgers, individual records, contracts and records relating to the sale of all commodities from Sept. 1, 1944 to Sept. 28, 1944" (R. 127-128, also Exhibit "A", attached to Petition, R. 189-141).

The hearing in connection with the subpoens was adjourned to October 4th, 1944. On that day, petitioner appeared at the office of the Enforcement Attorney and after being sworn, was asked by the Enforcement Attorney to produce his books and records pursuant to the subpoens Duces Tecums. The attorney for the petitioner before any books were turned over, asked a question and received a reply from the Enforcement Attorney, as follows:

"Mr. Siskind: Is the witness being granted immunity as to any and all matters or information obtained as a result of the investigation and examination of these records?

Mr. Greif: The witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to MPRs 271 and 426.

.Mf. Siskind: Under those circumstances I believe that Mr. Shapiro would like to make a statement for the record" (R. 146-147). The petitioner made this statement in the record:

A. (By Mr. Shapiro) I wish to note that I am appearing here as an unwilling witness pursuant to subpoena served upon me and that I claim my constitutional privilege. I do not waive immunity and specifically claim immunity under the provisions of the Emergency Price Control Act of January 30, 1942, and particularly United States Code, title 50, section 922, as well as under the Compulsory Testimony Act of February 11, 1893 (United. States Code 1934, title 49, section 46) and under the Constitution or any other applicable statute or provision or section of the United States Code or otherwise, as to any and all records produced or testimony given throughout this inquiry or investigation or any proceeding arising thereunder. Upon these conditions I have produced the records and documents called for in your subpoena addressed to me and dated September 28, 1944" (R. 147-149).

The motion was denied on April 17th, 1945 for reasons stated by U. S. District Judge Coxe in a memorandum in three cases against Joseph Justman et al., decided at about the same time (decided April 17, 1945. Criminal Docket #C119-145) (R. 160-161).

The gist of the Court's decision was to the effect that no immunity attaches to books and accords required to be kept by the provisions of Emergency Price Control Act. The Court completely disregarded the specific immunity provisions contained in that very Act.

At the trial, at the conclusion of the Government's case, the petitioner renewed the motion previously denied by Judge Coxe, urging the same grounds (R. 217-218). The Trial Judge refused to review Judge Coxe's decision, denied the motion and granted the petitioner an exception (R. 218).

The petition alleges, and it is not denied, that the allegations contained in Counts 7 to 11 of the information are based on facts obtained from the examination of the produced books and records (R. 134-135).

Petitioner was prosecuted for violation of the Emergency Price Control Act of 1942 (50 U.S. C. A. App. Sec. 901). Section 202 (b) thereof provides:

"The administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defence-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

## Sub-section (g) of said Section 202 provides:

"No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege."

The Compulsory Testimony Act of February 11, 1893 (49 U. S. C. A., Section 46) provides:

"Self-criminating testimony; perjury, refusal to No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the preceding chapter on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided. That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment. 27

Pursuant to the authority granted him by Section 202 (b) set forth above, the Administrator issued the following regulations: (Maximum Price Regulation No. 426)

"Sec. 1439.3. Article 2. Section 14. Records.

- (a) Every person subject to this regulation shall, so long as the Emergency Price Control Act of 1942, as amended, remains in effect, preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation.
- (b) Every person subject to this regulation shall keep and make available for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept, relating to the prices which he charges for fresh fruits and vegetables after the effective date of this regulation, and in addition as precisely as possible, the basis upon which he determined maximum prices for these commodities."

Petitioner's contention is that since he was compaled to produce documentary evidence which furnished information and leads concerning the transactions which are the basis of the criminal information, he received immunity from prosecution.

As stated in the previous paragraphs, petitioner made due and timely application to the United States District Court for a dismissal of the information on the uncontradicted grounds that the information which was the basis for the criminal prosecution was obtained by the prosecuting authorities from books produced by him in obedience to a subpoena issued by the Price Control Administrator. The United States District Court both before as well as during the trial overruled this contention, holding that no immunity attaches to books and records re-

quired to be kept by the provisions of the Emergency Price Control Act. The Circuit Court of Appeals sustained that contention, holding in fact that the books involved were public documents and that the forced production of such books does not confer either statutory or constitutional immunity. By a unanimous decision of the Circuit Court of Appeals written by Clark, C.J., the judgment of conviction was affirmed on February 7th, 1947.

# Specifications of Errors.

#### The Court below erred:

- (1) In holding, that the principle that the constitutional privilege against self-incrimination which protects individuals against being forced to produce private documents for inspection does not apply in the instant case, on the theory that the books produced were public records required by law to be kept.
- (2) In holding that the unambiguous, unequivocal and comprehensive statutory immunity provided by the Compulsory Testimony Act of 1893, incorporated by reference in the Emergency Price Control Act, should be construed as containing a qualification with regard to books and records kept by the average business man merely because they are books and records which the Administrator requires to be kept under the regulations issued by him pursuant, to the statutory authority.

## Reasons Relied on For Allowance of the Writ.

The Circuit Court of Appeals erroneously misconceived the purpose of the immunity statute. It, in fact, inserted into the act a qualification and practically amended an Act of Congress by judicial construction. The Court below seems to base its decision by relying on Wilson v. United States, 221 U.S. 361.

In that case, an officer of a corporation was subpoensed to produce the corporate books and records. He refused to produce the same claiming his constitutional privilege under the Fifth Amendment. Although holding that an officer of a corporation has no privilege to refuse production of the books, papers and records of the corporation, even though their contents tend to incriminate him, the Court recognized that the privilege against selfincrimination protects an officer of a corporation against the compulsory production of his private books and papers (p. 377). However, the Court held that there the records were not personal records but those of the corporation, and that the Fifth Amendment of the Constitution was not applicable to corporations. In the course of its opinion, the Court stated that since corporations were creatures of the State they were required to produce their records if the Government so insisted and that they could not claim the benefits of the Bitth Amendment. The Court also said, by way of dictum, that a person who was required to keep records by governmental order could not claim the privilege of the Fifth Amendment since they were not private papers, but in their nature, public records. This dictum has never been followed in a case similar to ours where a statute requiring the keeping of records also contains an immunity provision.

We urge further that the petitioner received constitutional immunity under the provisions of the Fourth and Fifth Amendments of the United States Constitution.

The Fourth Amendment of the United States Constitution prohibits the compulsory production of a person's private books and records; whether it be by a search warrant or subpoena duces tecum, or by a notice to produce.

Article IV of the Articles provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against un-

reasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

# Article V of the same provides:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The pertinent clause of the last Article is "nor shall be compelled in any criminal case to be a witness against himself."

A brief review of the history of the statutes governing the provisions for immunity to a natural person as co-extensive with the immunity guaranteed under the Fourth and Fifth Amendments of the United States Constitution is enlightening. Government agencies found themselves obstructed in the prosecution of suits against individuals and corporations because of witnesses claiming their constitutional privilege under the Fifth Amendment. Therefore, in order to aid the Government in obtaining necessary evidence, Congress adopted the Immunity Statute of February 25, 1868 (R. S. #860) which, in-brief, provided that no evidence obtained from a witness could be used against him in a criminal proceeding.

In Counselman v. Hitchcock, 142 U. S. 547, the Supreme Court declared this Immunity Statute unconstitutional because the immunity granted thereby was not coextensive with the Fifth Amendment. The Court pointed out on page 564 that the Statute would not

> "prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such It could not prevent the obtaining and the use of witnesses and evidence which should be applicable directly to the testimony which he might give under compulsion, and on which he might be convicted, when otherwise, and if he refused to answer, he could not possibly have been convicted."

A new statute was then passed by Congress, the Act of February 11, 1893, and incorporated in the Emergency Price Control Act of 1942 (Section 202, Subdivision g), under which the petitioner herein claimed immunity.

This act was declared constitutional in Brown v. Walker, 161 U. S. 591, holding that the Fifth Amendment does not deprive Congress of the power to compel the giving of testimony or the production of books and records, even though said testimony or books and records might incriminate the witness, provided that immunity be accorded the witness and that said immunity was complete and in all respects commensurate with the protection guaranteed by the constitutional limitation. Court stated that this immunity statute was one of general amnesty and the desired protection of the Constitution was fully accomplished.

This holding was reiterated by the Supreme Court in numerous other cases including Glickstein v. United States, 222 U. S. 139, wherein the Court stated on page

"It is undoubted that the constitutional guaranty of the Fifth Amendment does not deprive the law-making authority of the power to compel the giving of testimony, even although the testimony, when given, might serve to incriminate the one testifying, provided immunity be accorded, the immunity to be complete; that is to say in all respects commensurate with the protection guaranteed by the constitutional limitation."

In support of this oft-repeated proposition, the Court cites:

Brown v. Walker, 161 U. S. 591; Burrell v. Montana, 194 U. S. 572; Jack v. Kansas, 199 U. S. 372; Ballmann v. Fagin, 200 U. S. 186; Hale v. Hénkel, 201 U. S. 43; Heike v. United States, 217 U. S. 423.

In the case at bar it is conceded that the petitioner when appearing with the books and records and for the purpose of giving testimony pursuant to the directions of the subpoena served upon him, affirmatively claimed immunity.

The Office of Price Administration, by examining the books and records of the petitioner, was necessarily able to obtain leads which became the basis of the criminal information. This is obvious from an examination of the attached exhibits (R. 151-159). By obtaining the names of the particular customers with whom the petitioner traded during the period from September 1st, 1944 to September 28th, 1944, including the name and address of the witness D'Avino, the Government was able to go further and examine these particular customers as to transactions prior and subsequent to the period covered by the subpoena.

It is not essential that the Government should have received this information from these sources. It is sufficient that the Government may have. This has been the law since at least the time of Chief Justice John Marshall, who stated in the famous Aaron Burr trial (1 Burr's Trial, p. 244):

"Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness by disclosing a single fact may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obvionsly be infringed by compelling a witness to disclose a fact of this description. What estimony may be possessed, or is obtainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

The report of the Senate Committee on Banking and Currency submitted to accompany the Emergency Price Control Act (H. R. #5990) and being Senate Report No. 931 of the year 1942, states as follows (p. 21):

"Section 202(a) authorize the administrator to make studies and investigations and to obtain the economic and other data necessary or proper in prescribing maximum price, rent, and other regulations and orders, and in the administration and enforcement of such regulations and orders and of the provisions of the bill. This authority may be enforced through the usual forms of compulsory process and the power to inspect and copy documents, inspect inventories and defense-area housing accommodations. The power to require by regulation or order keeping of records and the making of reports is also granted by this subsection.

"Although, no person is excused from complying with any requirement of this subsection, because of his privilege against self-incrimination, the immunity provisions of the Compulsory Testimony Act of February 11, 1893, are made applicable with respect to any individual who specifically claims such privileges."

The words "subsection" in both paragraphs indicate that Congress intended that the immunity provision was to apply to records and reports required to be kept under that very Act.

It is significant that the immunity provisions of the Emergency Price Control Act required the individual to specifically claim such privilege. The Government would be in a position of determining whether, though immunity be granted, theoevidence was necessary to undertake its investigation, or the Government could take the alternative: of not accepting this evidence because of the claim, but relegate itself to procure evidence from other sources. The latter procedure was adopted by the Securities and Exchange Commission in the case of Edwards v. U. S., 312 U. S. 473.

Immunity provisions similar to the one here involved are contained in other Federal statutes which also require the maintenance of books and seconds or authorize the enforcing agency to require their maintenance. These include:

Securities Exchange Act of 1943, 42 Stat. at L. 74, chap. 38, 15 U. S. C. A. 77; National Labor Relations Act, 15 Stat. at L. 449; 29 U. S. C. A. 161; Public Utility Holding Company Act of 1935, 49 Stat. at L. 803, chap. 687, 15 U. S. C. A. 79s; Federal Power Act, 49 Stat. at L. 858; chap. 687, 16 U. S. C. A. 825f; Civil Aeronautics Act of 1938, 52 Stat. at L. 973, chap. 601, 49 U. S. C. A. 644; Fair Labor Standards Act of 1938, 52 Stat. at L. 1060, chap. 676, 29 U. S. C. A. 208.

That the immunity provisions of a statute should not be construed to be meaningless is seen from cases arising under the Securities Exchange Act which, as stated above, has an immunity provision similar to that contained in the Emergency Price Control Act (15 U. S. C. A. 78v) and a section authorizing the Securities and Exchange Commission to regulate the maintenance of records. Edwards v. Under Matters, cited supra.

The question of rederal Law which is involved here is an important one which should be settled by this Court. A research of the reported cases shows that the question of the applicability of the immunity provision of the Emergency Price Control Act to the forced production of books and records kept by a business man pursuant to the requirement of the Act, was raised only twice in criminal proceedings, once in the instant case, and again in another proceeding known as In re Hoffman, decided by the District Court of the United States for the District of Columbia on October 4th, 1946 (68 F. Supp. 53).

None of the cases cited by the Circuit Court in its written opinion (footnote of page 166 of the record), except In Re Hoffman, cited supra, involved the construction of the specific statutory immunity provision of the Emergency Price Control Act. They were mainly civil proceedings and dealt primarily with the statutory provision giving the Administrator the right to compel the production of books and records required by him to be kept and the contention of the defendants that the right given to the Administrator to subpoena such records violated the defendants' constitutional privileges against selfincrimination. While these Courts in these decisions by way of dictum refer to the fact that books and records required by the Emergency Price Control Act to be kept are in the nature of quasi-public documents, the construction of the statutory immunity was not involved. construction of the statute of immunity was first raised in the instant case and again In re Hoffman, cited supra.

The decision of the District Court In re Hoffman, supra, is directly contrary to the decision in the instant case. In re Hoffman, the District Court held

"that the statute should be construed so as to accord immunity from prosecution on the basis of information obtained from any records produced in response to a subpoena issued by the Administrator, because the statute contains no exception and no limitation and there is no ambiguity or obscurity in the legislative enactment" (p. 54).

That decision is now on appeal to the United States Court of Appeals for the District of Columbia and is designated United States of America v. James Hoffman, #9435. The appeal has not yet been argued. So, in fact, we have now two contrary decisions on an important question of Federal Law which should be settled by this Court.

#### Conclusion.

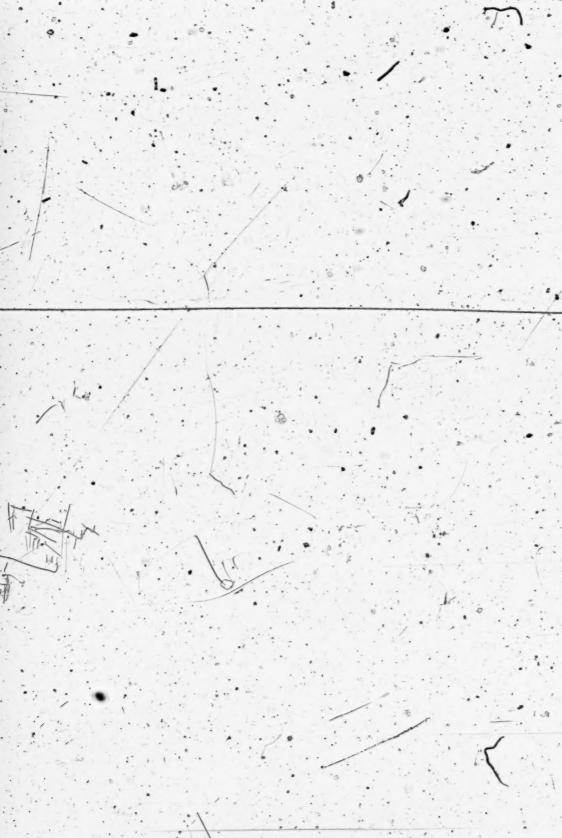
Wherefore, it is respectfully submitted that this petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit, be granted to review the decision and judgment of the Circuit Court of Appeals for the Second Circuit.

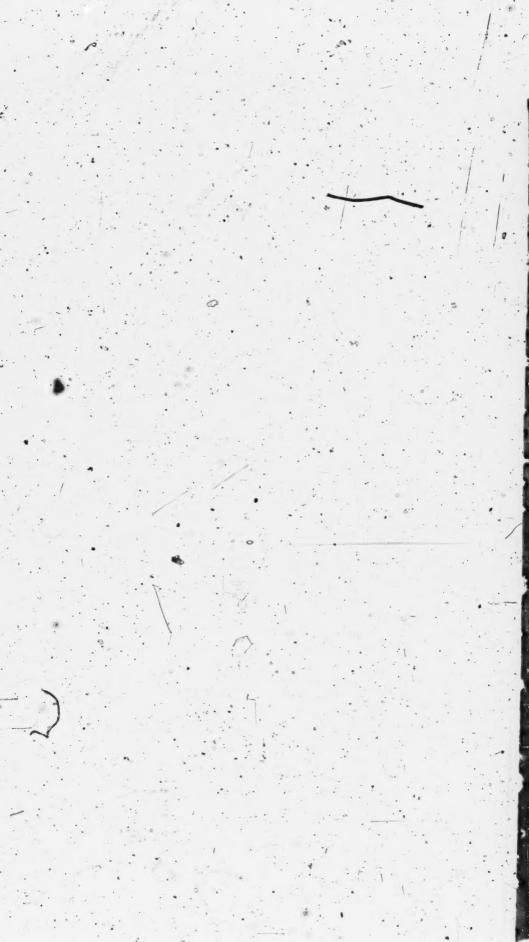
Respectfully submitted,

CURRAN & STIM, Attorneys for Petitioner.

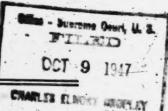
MENAHUM STIM, Of Counsel.

March 3, 1947.





# FILE COPY



IN THE

# Supreme Court of the United States

October Term, 1947.

No. 49.

# WILLIAM SHAPIRO,

Petitioner.

AGAINST

# UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES

CIRCUIT COURT OF APPEALS FOR

THE SECOND CIRCUIT.

# BRIEF FOR PETITIONER.

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Sec. 202 (b) (50 U. S. C. A. App. Sec. 922)
(h) Sec. 922
(b)
Sec. 202 (g) (50 U. S. C. A. App. Sec. 922
(g)
MPD 496 Garations:
MPR 426, Sec. 1439.3
MPR 271
Fair Labor Standards Act, U. S. C. A. Title 29,
Sec. 209, 211
Federal Power Act, U. S. C. A. Title 16, Sec
825a, 825f (g)
Internal Revenue Regulations 111, Sec. 29, 54.1 18 21
Judicial Code as amended by Act of Feb 13
1925, Sec. 240(a) (43 Stat. 938 28 II S C
Sec. 347 a)
29 See 156 161
Public Utility Holding Company Act, U. S. C. A.
1110 15 800 700 (-) 70 ( ) 70
Second War Powers Act of 1942, 50 U. S. C. A.
Ann. Sec. 633 (3) 622 (4)
App. Sec. 633 (3), 633 (4)
Securities Exchange Act, U. S. C. A. Title 15,
Sec. 78q, 78u (d)
Miscellaneous:
Report of the Senate Committee on Banking and Currency, submitted to accompany the Emer-
gency Price Control Act (H. R. #5990 and
being Senate Report No. 931 of the year 1942) 10, 11
Wigmore on Evidence, Vol. VIII Sec. 2259 c 18
COURT RULES:
Rule XI of the Rules of Practice and Procedure
after verdict, etc



#### IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

WILLIAM SHAPIRO,
Petitioner,

AGAINST

No: 49

UNITED STATES OF AMERICA, Respondent.

On WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR PETITIONER.

#### Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 159 F. 2d, 890 (R. 122-127). There was no opinion in the District Court for the Southern District of New York.

#### Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C., Sec. 374a), and as modified pursuant to the Act of March 8, 1934 (18 U. S. C., Sec. 688), by Rule XI of the Rules of Practice and

Procedure after verdiction criminal cases (292 U. S. 661, 666).

The judgment of the Circuit Court of Appeals was entered on February 7th, 1947 (R. 128). The petition for writ of certiorari was filed on March 5th, 1947. The Government did not oppose the granting of certiorari as the question involved, "is an important one" which "has not been, but should be, definitely decided by this Court". (Government's Memorandum p. 3). Certiorari was granted on June 2nd, 1947 (R. 128).

#### Questions Presented.

The questions presented are as follows:

- 1. Was the petitioner, who properly claimed immunity, entitled to immunity by virtue of Section 202 (g) of the Emergency Price Control Act of 1942 (50 U.S. C. A. App. 922 [g]) when he produced, pursuant to a subpoena of the Price Control Administrator, books and records required to be kept pursuant to Section 202 (b) of said Act?
- 2. Where the Price Control Administrator, by regulation, requires an individual to keep records " of the same kind as he has customarily kept", do such records become "public records" which are not entitled to the immunity granted by Section 202 (g) of the Emergency Price Control Act and the Fifth Amendment!
- 3. Are the provisions of Section 202 (g) of the Emergency Price Control Act and the regulations issued pursuant thereto violative of the Fifth Amendment in that the protection afforded thereby is not as broad as that of the Fifth Amendment?

# Statutes and Regulations Involved.

The petitioner was prosecuted for violation of the Emergency Price Control Act (50 U. S. C. A. App. Section 901). Section 202 (b) thereof (50 U. S. C. A. App. 922 [b]) provides:

"The administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defence-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

# Subsection (g) of said section provides:

"No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege."

The Compulsory Testimony Act of February 11th, 1893 (49 U. S. C. A. 46), provides:

Pursuant to the authority granted by Section 202 (b) of the Emergency Price Control Act, the Administrator

Contract of

issued the following regulations (Maximum Price Regulation No. 426):

- "Sec. 1439.3. Article 2. Section 14. Records.
- (a) Every person subject to this regulation shall, so long as the Emergency Price Control Act of 1942, as amended, remains in effect, preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation.
- keep and make available for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept, relating to the prices which he charges for fresh fruits and vegetables after the effective date of this regulation; and in addition as precisely as possible, the basis upon which he determined maximum prices for these commodities."

#### Statement.

The petitioner is a wholesaler of fruit and produce (R. 63). On or about September 29th, 1944, more than two months prior to the filing of the information upon which the petitioner was convicted, he was served with a subpoena Duces Tecum and Ad Testificandum, issued by the Administrator of Price Control. The subpoena directed him to appear before the Chief Enforcement Attorney for the Office of Price Administration on October 2nd, 1944 to testify concerning

"all purchases and sales of fresh fruit and vegetables from Sept. 1, 1944 to Sept. 28, 1944,"

#### and to produce at that time

"all duplicate sales invoices, sales books, ledgers, inventory records, contracts and records relating to the sale of all commodities from Sept. 1, 1944 to Sept. 28, 1944" (R. 35).

The hearing in connection with the subpoena was adjourned to October 4th, 1944. On that day, petitioner appeared at the office of the Enforcement Attorney. After being sworn, he was asked by the Enforcement Attorney to produce his books and records pursuant to the subpoena Duces Tecum. The attorney for the petitioner before any books were turned over, asked a question and received a reply from the Enforcement Attorney, as follows:

"Mr. Siskind: Is the witness being granted immunity as to any and all matters or information obtained as a result of the investigation and examination of these records?

Mr. Greif: The witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to MPRs 271 and 426.

Mr. Siskind: Under those circumstances I believe that Mr. Shapiro would like to make a statement for the record" (R. 37).

The petitioner then made this statement on the record:

"I wish to note that I am appearing here as an unwilling witness pursuant to subpoen served upon me and that I claim my constitutional privilege. I do not waive immunity and specifically claim immunity under the provisions of the Emergency Price

Control Act of January 30, 1942, and particularly United States Code, Title 50, Section 922, as well as under the Compulsory Testimony Act of February 11, 1893 (United States Code 1934, Title 49, Section 46) and under the Constitution or any other applicable statute or provision or section of the United States Code or otherwise, as to any and all records produced or testimony given throughout this inquiry or investigation or any proceeding arising thereunder. Upon these conditions I have produced the records and documents called for in your subpoena addressed to me and dated September 28, 1944" (R. 37).

Thereafter there was filed against the petitioner an information, consisting of 48 counts, charging him with violating the price control regulations by engaging in tying-in agreements (R. 2-31). The leads which resulted in the obtaining of the information were developed from the books produced by the petitioner in obedience to the subpoena issued by the Price Control Administrator (R. 123).

Prior to the trial the petitioner moved on March 13th, 1945, by a plea in bar, for the dismissal of the information on the ground that he had obtained immunity (R. 31-39).

The motion was denied on April 17th, 1945 for reasons stated by United States District Judge Coxe in a memorandum in three cases against Joseph Justman, et al., decided at about the same time (R. 40). The gist of that decision was that no immunity attaches to books and records required to be kept by the provisions of the Emergency Price Control Act.

The petitioner renewed such motion upon the trial at the conclusion of the Government's case (R. 55). The Trial Judge refused to review Judge Coxe's decision, denied the motion and granted an exception (R. 55).

The petitioner was found not guilty on all counts of the information submitted to the jury except Counts 7, 8, 9, 10 and 11, dealing with sales to one D'Avino (R. 91-92).

After the verdict the petitioner moved to set aside the verdict as being against the weight of evidence and contrary to law. This motion was denied and an exception taken (R. 93). He further moved in arrest of judgment and for a new trial (R. 106-109), which motion was also denied (R. 114).

The sentence imposed by the Trial Court upon the

petitioner was a fine of \$5,000.00 (R. 114).

The conviction was unanimously affirmed on appeal by the Circuit Court of Appeals for the Second Circuit (R. 122-127).

## Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in holding that:

- 1. Section 202 (g) of the Emergency Price Control Act did not require, and Congress did not intend, that immunity be extended to an individual producing, pursuant to subpoena, records required by said Act to be kept by him (R. 122-127).
- 2. The petitioner's records were "public records" to which immunity did not attach (B. 125).
- 3. The statutory immunity of Section 202 (g) of the Emergency Price Control Act extends only to oral testimony and documents subpoenaed by the Administrator of Price Control which were not required by said Act to be kept (R. 126).
- 4. Section 202 (g) of the Emergency Price Control Act, and the regulations issued pursuant thereto, as inter-

preted by the Circuit Court of Appeals, affords a protection as broad as that of the Fifth Amendment to the Constitution (R. 125).

5. The granting of immunity to the petitioner would destroy the value of the record keeping requirements of the Emergency Price Control Act (R. 127).

#### POINT I.

The express provisions of Section 202 (g) of the Emergency Price Control Act and the clear intent of Congress require the granting of the immunity claimed by the petitioner.

# The Emergency Price Control Act

Section 202 of the Emergency Price Control Act is clear and unambiguous. Subsection (b) thereof endows the Administrator of the Office of Price Administration with extensive authority to command the production of books and records. The exercise of such power, however, is limited by the provisions of subsection (g) which grants "to any individual who specifically claims such privilege" the broad immunity of the Compulsory Testimony Act of February 11, 1893. This immunity is extended to any person "complying with any requirements under this section". \*\*

The immunity attending compliance "with any requirements" of Section 202 necessarily includes the production, pursuant to subpoena, of records required to be kept by the Administrator in accordance with regulations issued under the authority of said section.

<sup>&</sup>quot;It is undisputed that the petitioner properly claimed any privilege which accrues to him under the Emergency Price Control Act.

"Italies supplied throughout.

#### The Congressional Intent

If there be doubt as to the all inclusive nature of the immunity granted by Section 202 of the Emergency Price Control Act, such doubt is resolved by the report of the Senate Committee on Banking and Currency submitted to accompany the Emergency Price Control Act (H. R. #5990) and being Senate Report No. 931 of the year 1942, which states as follows (at p. 21):

to make studies and investigations and to obtain the economic and other data necessary or proper in prescribing maximum price, rent, and other regulations and orders, and in the administration and enforcement of such regulations and orders and of the provisions of the bill. This authority may be enforced through the usual forms of compulsory process and the power to inspect and copy documents, inspect inventories and defense-area housing accommodations. The power to require by regulation or order keeping of records and the making of reports is also granted by this subsection."

The foregoing statement is followed immediately by the statement:

"Although, no person is excused from complying with any requirement of this subsection, because of his privilege against self-incrimination, the immunity provisions of the Compulsory Testimony Act of February 11, 1893, are made applicable with respect to any individual who specifically claims such privileges."

It is obvious both from the general context of the foregoing quotation and the repetition of the words "this subsection" in both paragraphs thereof that the immunity provision was to apply to records required to be kept under the Emergency Price Control Act.

The Emergency Price Control Act and the Report of the Senate Committee on Banking and Currency indicate that Congress was desirous of granting to the Administrator power to "obtain the economic and other data necessary or proper in prescribing maximum price, rent and other regulations and orders". This power included the right to compel the keeping of records and the making of reports. By recourse to the records of a particular industry, price schedules and regulations could be formulated for such industry. Such records were likewise meant to be and were of substantial assistance in the civil enforcement of the Emergency Price Control Act. The civil penalties attendant upon a violation of such Act were severe. The criminal enforcement of the Act, however, was not, in the eyes of Congress, of such importance as to eliminate the Constitutional safeguards attending the compelled production by subpoena of an individual's records. It therefore specifically incorporated in the Emergency Price Control Act the broad immunity provisions of Section 202 (g).

#### The Case Law

This Court has never passed upon the questions presented by the case at bar. For this reason and the fact that the cases in the lower courts have expressed conflicting opinions, the Government did not oppose the granting of certiorari.

The assumption by the Circuit Court of Appeals that Congress "intended" to limit immunity where the records involved were kept pursuant to the order of the Administrator, finds, as we have seen, no basis either in the Emergency Price Control Act itself or in its legislative history. Congress could have spelled out such exception had it so

intended. It did not do so. As stated by the District Court of the District of Columbia, in In Re Hoffman, 68 F. Supp. 53 (D. C. District of Columbia), now on review in this Court:

"To read into the statute the qualification which the Administrator would have this Court insert into the Act would practically be to amend an Act of Congress by judicial construction. The Act as it stands is unambiguous and unequivocal as well as comprehensive. An insertion of the restriction would, in effect, be an amendment of the Act."

The Hoffman case involved a criminal proceeding to punish the respondent for contempt of court in violating an injunction.

In Porter v. Wright, et al., 69 F. Supp. 46 (D. C. Oregon), McColloch, D. J., in a supplemental opinion rendered December 6th, 1946, expressed his agreement with the decision in In Re Hoffman, supra, and assailed the effort made by administrative boards to weaken constitutional rights previously held unassailable, as follows, at page 47:

"From Justice Holtzoff's opinion and from arguments that have been made in this court, I understand that OPA relies on the 'Public Records' or 'Quasi-Public Records' doctrine, which has swept the Circuit Courts of Appeal, but so far has not been accepted in the Supreme Court. Davis v. United States, 66 S. Ct. 1256. The argument is, that as to a record required to be kept by statute or administrative regulation, there can be no claim of frivilege against self-incrimination. This, despite the fact that the Price Control Act concedes the right. 50 U. S. C. Appendix, Sec. 922 (g), 50 U. S. C. A. Appendix, Sec. 922 (g)."

In Phelps v. United States, 160 F. 2d, 858 (C. C. A. 8th), decided April 3, 1947, Riddick, C. J., in the dissenting opinion, stated as follows:

"If, as appellant Peters asserts, he specifically claimed the exemption provided by the Act of February 11, 1893, we may not deny his claim of immunity from prosecution because he was not sworn or because of the 'required records doctrine', unless we read into the Act something that Congress declined to part in it."

In Spevak v. United States, 158 F. 2d 594 (C. C. A. 4th), decided December 6, 1946, Parker, C. J., in a unanimous opinion of that Court, considered the immunity provision of the Emergency Price Control Act. The appellant appealing from his conviction claimed that certain evidence consisting of photostatic copies of invoices were improperly admitted at the trial. The Court held that such evidence was admissable as the invoices were voluntarily furnished. It indicated, however, that had the privilege against self-incrimination been claimed, the result may well have been different, when it stated at page 597:

"We think it perfectly clear that since appellants were not required to produce the invoices under subpoena or otherwise, but furnished them voluntarily to officials of the government without claiming the privilege against self-incrimination as provided by the statute, there is nothing in the law which forbids their being received as evidence."

The divergent view which regards "with disfavor the constitutional privilege against self-incrimination", is

<sup>\*</sup>See concurring opinion of Judge Frank in U. S. v. Davis, 151 F. 2d

expressed, by way of dictum, in the cases cited by the Circuit Court of Appeals in support of its decision. These cases are distinguishable on the facts. For the most part they were cases where the defendants had waived their rights to immunity by voluntarily allowing the full inspection of their records by inspectors of the Office of Price Administration, or cases, brought to recover treble damages, which were held to be civil in nature and, therefore, did not directly involve the question of immunity.\*\*

In Rogers v. United States, 138 F. 2nd 992 (C. C. A. 6th), also cited by the Circuit Court of Appeals, there was involved a provision of the Agricultural Adjustment Act which required the filing of certain reports. \*\*\* The Act contained no immunity provision. The prosecution was for the failure to file the report required for the purpose of computing subsidy payments to farmers. In the instant case, not only is there a specific immunity provision contained in the Emergency Price Control Act, but the records involved were not records which were required to be filed thereunder.

#### The Reasoning of the Circuit Court of Appeals

The Circuit Court of Appeals argued that Congress never intended to grant immunity which "would destroy the value of the record-keeping requirements-which are unquestionably valid, United States v. Sullivan, 274 U. S. 259,-by making their use dependent upon the waiver of suspected wrong-doers of the privilege against self-inerimination" (R. 127). We submit no such result would follow the granting of immunity to the petitioner. The

<sup>\*</sup>Bowles v. Bestrice Creamery Co. (C. C. A. 10th) 146 F. 2d 774;
Bowles v. Glick Bres. Lumber Co. (C. C. A. 9th) 146 F. 2d 566; Bewles v.
Stittsinger (D. C.) 59 F. Supp. 94; Bowles v. Kirk (D. C.) 59 F. Supp. 97.

\*\*Amate v. Porter (C. C. A. 10th) 157 F. 2d 719; Bowles v. Chew
(D. C.) 53 F. Supp. 787; Bowles v. Seits (D. C.) 62 F. Supp. 773; Bowles
v. Miele (D. C.) 64 F. Supp. 835.

\*\*\*The filing of specific reports presents a different situation more fully considered in Point H infra.

record-keeping requirements would still be of inestimable value in enforcing the severe civil penalties of the Emergency Price Control Act and in criminal prosecutions against persons other than the witness. Concededly criminal prosecutions against the witness would be rendered more difficult if the witness, a suspected wrongdoer, refused to waive immunity. But such has always been the case where an individual has relied on his constitutional privilege against self-incrimination. The grant of such privilege, however, does not of necessity mean that the suspected wrong-doer would go unpunished. As the Circuit Court of Appeals stated in its opinion, the Administrator in the case at bar obtained the names of the petitioner's customers from the books examined by its enforcement agents and ascertained that one of such customers was prepared to testify against the petitioner (R. 123). If upon the petitioner's claim of immunity the enforcement agents had refused to use the petitioner's books, he could nevertheless have been prosecuted upon the testimony of his customers. As the United States Attorney aptly pointed out in his brief in the Circuit Court of Appeals, the Government "could with great ease have interviewed customers as they left the appellant's place of business".

It is likewise erroneous to argue, as the Circuit Court of Appeals did, that Congress could not have intended to grant immunity to the petitioner because the immunity granted him must be "coterminous with what otherwise would have been the privilege of the person concerned" (Heike v. United States, 227 U. S. 131, 142). In the Heike case corporate records were involved. Corporate records since the decision in Wilson v. U. S., 221 U. S. 361, 380, have been deemed excluded from the protection of the

<sup>&</sup>quot;It is not essential that the Government should have received this information from these sources. It is sufficient that the Government may have. This has been the law since at least the time of the decision of Chief John Marshall in the famous Agron Burr case (1 Burr's Trial, p. 244).

privilege against self-incrimination." We do not argue that the production of corporate records would entitle a person to immunity under the Emergency Price Control Act. We do contend, however, that an individual's records are entitled to such immunity whether or not the Emergency Price Control Act be determined to grant immunity coterminous with the constitutional privilege or whether such immunity be determined to be broader than such constitutional privilege. (United States v. Monia, 317 U. S. 424.) An individual's records have always been entitled to immunity under the Constitution and the Compulsory Testimony Act. And if there be any doubt as to the right thereto, the Emergency Price Control Act in specific terms states that an individual "complying with any requirements" under Section 202 is entitled to such immunitywhich immunity is granted to him whether the records produced by him be denominated "public records" or not.

This is a case of first impression in this Court. The decisions of the lower Federal Courts are in conflict. It is, therefore, necessary to consider de novo not only the specific provisions of the statute involved and regulations issued pursuant thereto, but also the far-reaching effect of the acceptance of the Government's position (See Point II, infra). Disregarding for the moment, however, the disastrous effect upon the basic indispensable privileges of our democratic system of Government which would result from the unlimited extension of the public records doctrine, and the question of whether or not petitioner's records were actually public records, the fact, nevertheless, is that the immunity claimed by the petitioner was granted to him by the specific provisions of Section 202 (g) of the Emergency Price Control Act.

#### POINT II.

To deny the petitioner immunity because the documents produced by him were required to be kept by the Administrator would render Section 202 (g) of the Emergency Price Control Act meaningless and violative of the Fifth Amendment to the Constitution.

Section 1439.3, Article 2, Section 14 (a) of Maximum Price Regulation 426, issued by the Administrator pursuant to the authority of Section 202 of the Emergency Price Control Act, requires a person subject thereto to keep and make available for examination "all his records including" certain specified records. Section 14 (b) thereof requires him to keep "records of the same kind as he has customarily kept".

The sweeping nature of this regulation is self-evident. It is one thing to hold that administrative requirements that specific transactions be recorded, or that particular reports be filed, serve to make such records and reports public records. When, however, the only requirement is that an individual keep the same records as he customarily kept, such records cannot possibly be held to be public records. They are personal in nature. They involve his ordinary, every-day business, and every detail thereof. All business records have some bearing on prices charged. In fact under certain regulations, prices are determined from records made prior to the enactment of the Emergency Price Control Act which were certainly at that time private records. To hold such records to be public records would destroy completely the immunity attaching to the production of an individual's private records. For all private records would become public records upon the issuance by an administrative officer of a directive requir-

<sup>\*</sup>See In re Hoffman, supra, where the regulations provided for the keeping of records "in regard to every used car he has acquired" which obviously referred to used cars acquired before the enactment of the Emergency Price Control Act.

ing an individual to keep all records previously kept by him.

The public records doctrine is founded upon a dictum of this Court in Wilson v. United States, 221 U. S. 361. The decision in that case was that a corporate officer may be required to produce corporate books. Nothing more was involved. In its opinion the Court observed that the mere physical custody of incriminating documents does not protect the custodian against their production. Accordingly, public records, official documents kept in the administration of public office, and "records required by law to be kept in order that there may be suitable information of transactions which are the purported subject of governmental regulation", must be produced.

Originally this doctrine was confined to druggists' records of prescriptions or of the sale of poisons or intoxicating liquors; to physicians' reports of deaths and their causes; to reports of accidental injuries in factories; to motorists' reports of accidents; and to other transactions made subject to statutory regulations, relating to the keeping of specific records in respect of conduct regarded as peculiarly subject to State control. In recent years the doctrine has been extended by the lower Federal Courts, usually by way of dictum, to all records kept pursuant to administrative regulation. We submit that the dictum of this Court in Wilson v. United States, supra, was never meant to permit all records to become public records at the will of an administrative officer. The distinction between public and private records is implicit in the discussion contained in Wigmore on Evidence (Vol. VIII. Sec. 2259c):

"Sec. 2259e. Crime disclosed in (1) Public Books, or (2) Books Required by Law to be Kept. 1. Public.

<sup>\*</sup>Compare U. S. v. Murdock, 284 U. S. 141, Internal Revenue Agent v. Sullivan, 287 Fed. 138 and Steinberg v. United States, 14 F. (2d) 564, 568. The Internal Revenue Regulations require taxpayers to keep books and records (Regulation 111, Secs. 29, 54-1). No suggestion was advanced in these cases that the regulations converted the defendant's private books and records into public records and deprived him of his privilege against self-inorimination. against self-incrimination.

official books, being the property of the State, are always accessible to its representatives and usually to the public.

2. The same reasoning applies to records required by taw to be kept by a citizen not being a public official, e.g. a druggist's report of liquor sales, or a pawn-broker's record of pledges. The only difference here is that the duty arises not from the person's general official status, but from the specific statute limited to a particular class of acts."

The public records doctrine as stated in the Wilson case was in substance that the acceptance of a license to conduct a particular business pursuant to a statute requiring the keeping of certain records, constitutes, in effect, the voluntary waiver of the privilege against self-incrimination. We submit that the Emergency Price Control Act does not in any sense confer upon those subject thereto a privilege in exchange for which their Constitutional privilege is waived. If the limited doctrine of the Wilson case is to be broadly applied to any area of permissable governmental control, the constitutional privilege of self-incrimination becomes solely subject to the will of Congress. There is no field of legislative regulation which may not involve the keeping of records. The Emergency Price Control Act itself, and the thousands of complex regulations issued thereunder, regulated virtually every field of

This Court should not ascribe to Congress an intent to have Section 202 (g) of the Emergency Price Control Act become meaningless. Yet such is the effect of the decision below. The Circuit Court of Appeals in attempting to give some meaning to Section 202 (g), of the Emergency Price Control Act argues that the immunity would apply "to oral testimony given in hearings and investigations conducted by the Administrator" and to the production of documents which the Administrator had subpoenaed but

which he had not required to be kept (R. 126). It is difficult to conceive of any document falling in the latter category when all records "customarily kept" must continue to be kept. Actually the holding of the Circuit Court of Appeals deprives an individual of all immunity with respect to documentary evidence. It matters not that such individual might have immunity with respect to his oral testimony. Section 202 (g) of the Emergency Price Control Act was never meant to limit immunity to oral testimony. The Administrator under said section may not only compel a person to appear and testify but also "to appear and produce documents". And the provisions of the Compulsory Testimony Act incorporated into the Emergency Price Control Act specifically excludes the prosecution of a person "for or on account of any transaction which he may testify, or produce evidence, documentary or otherwise. . . " Furthermore, oral testimony would rarely have to be resorted to by the Government if all the records of an individual became public records, which he could be compelled to produce without being granted immunity.

As stated by the Government in its memorandum submitted in connection with the petitioner's application for a writ of certiorari, the question in the case at bar "is an important one which affects not only the Emergency Price Control Act but many other. Federal regulatory statutes which confer upon administrative agencies power to require and to subpoen records," and which incorporated by reference or by terminology the immunity provisions of the Compulsory Testimony Act of 1893". An affirmance of the decision below will be construed by the Government as a "green light" permitting it to proceed by sweep-

Among these are Securities Exchange Act of 1934, 15, U. S. C. Sect. 78q, 78u.(d); National Labor Relations Act, 29 U. S. C. A. Secs. 156, 161; Public Utility Holding Company Act of 1935, 15 U. S. C. A. Secs. 79v(c), 79r(c), 79r(c); Federal Power Act, 16 U. S. C. A. Secs. 825a, 825t(g); Civil Aeronautics Act of 1938, 49 U. S. C. A. Secs. 425(a), 644; Fair Labor Standards Act of 1938, 29 U. S. C. A. Secs. 209, 211, 49 U. S. C. A. Secs. 49, 50; Second War Powers Act of 1942, 50 U. S. C. A. App. Secs. 633(3), 633(4).

ing regulations (such as are involved in the case at bar) to convert all private records into public records. The Government has requested a "go ahead signal", whereby it will be permitted to by-pass an individual's constitutional rights in an effort to simplify its task in criminal prosecutions.

Mr. Justice Murphy in U. S. v. Jasper White, 322 U. S. 694, after stating the underlying reasons for the privilege against self-incrimination, stated at page 698:

"The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly imbedded in our constitutional and legal frameworks as a

bulwark against iniquitous methods of prosecution."

The Fifth Amendment and the underlying reasons therefor could be completely and effectually disregarded if the decision below is affirmed. Congress and administrative tribunals could, by requiring the keeping of customary and usual records, bring all records within the scope of the public records doctrine. The books and records of individual business men and farmers would become public property. The privilege against self-incrimination would not exist as to them. In the same category would be the great army of individual taxpayers who are required to keep records properly reflecting their income (Regulation 111, Secs. 29, 54-1). Records which become public records for one purpose could be used to ferret out crimes having no relation to the purposes of the regulatory enactment. To augment "the irksomeness" of governmental regulation by coupling it "with the loss of a fundamental constitutional right would be to build up

popular resistance to needed governmental controls". (See opinion of Judge Frank, U. S. v. Davis, 151 F. 2d 140, 144).

Finally, the Emergency Price Control Act and the regulations issued pursuant thereto are constitutional only if they afford a protection as broad as that of the Fifth Amendment (Counselman v. Hitchcock, 142 U. S. 547; Brown v. Walker, 161 U. S. 591; Glickstein v. U. S., 222 U. S. 139). That would not be the case if their coverage were dependent only upon the will of the administrator. It would not be the case if their effect was to eliminate all documentary evidence from the protection granted by the Fifth Amendment. The Constitution exists as a protection for the citizen against the State. Devices which will have the effect of weakening and in the end nullifying constitutional privileges are always available and readily justified by the exigencies of the moment. A repeal of constitutional protection should not be effected by Congressional legislation or administrative regulation.

#### CONCLUSION.

The conviction of the petitioner should be reversed and the information dismissed. Petitioner acquired immunity upon producing the records subposensed by the Administrator of Price Control and claiming such immunity in accordance with the provisions of the Emergency Price Control Act.

Respectfully submitted,

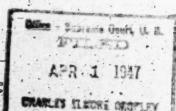
CURRAN & STIM, Attorneys for Petitioner.

MENAHEM STIM,
MICHAEL C. BERNSTEIN,
BERNARD TOMSON,
EUGENE M. PARTER,
Of Counsel.





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### No. 1098 49

## In the Supreme Court of the United States

OCTOBER TERM, 1946

WILLIAM SHAPIRO, PETITIONER

United States of America

ON PETITION FOR A WRIT OF CERTIONARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

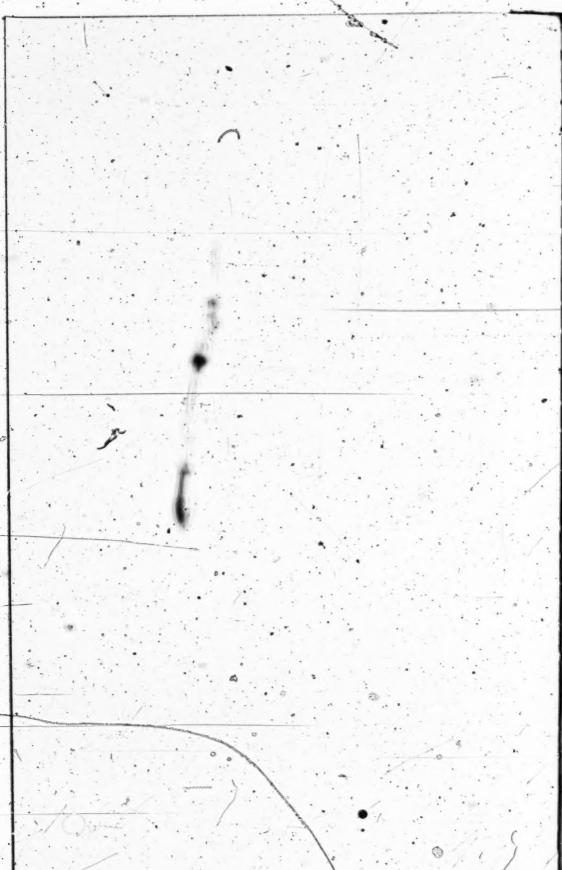
MEMORANDUM FOR THE UNITED STATES



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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

#### MEMORANDUM FOR THE UNITED STATES

Petitioner was convicted on five counts of an information returned against him in the United States District Court for the Southern District of New York, charging violations of the Emergency Price Control Act (R. 3-39, 120), and was sentenced to pay a fine of \$1,000 on each count (R. 55).

Before trial, petitioner interposed a plea in bar, claiming immunity from prosecution by virtue of Section 202 (g) of the Emergency Price. Control Act (50 U. S. C. App., Supp. V, 922 (g)) and the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (49)

U.S. C. 46). In his plea, he alleged that he had been served with a subpoena duces tecum requiring him to produce before an attorney of the Office of Price Administration "all duplicate sales invoices, sales books, ledgers, individual records, contracts and records relating to the sale of all commodities from September 1st, 1944, to September 28th, 1944"; that he appeared pursuant to the subpoena and claimed his constitutional privilege against self-incrimination and that he was not waiving his immunity under the statutes; that desite such claim, he was directed to, and did turn over his books and records to the O. P. A. attorney, and that the prosecution was based upon information derived from such books and records. (R. 42-53.) The plea in bar was overruled (R. 54).

On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment against petitioner (R. 169), holding that the constitutional privilege against self-incrimination does not extend to records required by law to be kept, and that the statutory immunity granted by Section 202 (g) of the Emergency Price Control Act and the Compulsory Testimony Act of 1893 did not extend to one who produced records falling outside the scope of the constitutional privilege (R. 163-168).

The sole question presented by the petition for certiorari is the scope of the immunity pro-

These provisions are copied in the petition for certiorari at pp. 6-7.

visions of Section 202 (g) of the Emergency Price Control Act and the Compulsory Testimony Act as applied to records required by law to be kept which have been produced pursuant to a subpoena after a claim of privilege. Although we believe that the holding below is correct for the reasons stated in the court's opinion, we do not oppose the granting of the petition for a writ of certiorari for the following reasons:

1. As appears from the decision below (R. 164, fn. 2), the question is an important one which affects not only the Emergency Price Control Act, but many other federal regulatory statutes which confer upon administrative agencies power to require and to subpoena records, and which incorporate by reference or by terminology the immunity provisions of the Compulsory Testimony Act of 1893. The question whether such immunity provisions extend to subpoenaed records required by law to be kept has not been, but should be, definitely decided by this Court.

2. In In re Hoffman, 68 F. Supp. 53, the District Court for the District of Columbia held, contrary to the decision below, that Section 202 (g) of the Emergency Price Control Act and the Compulsory Testimony Act of 1893 did confer immunity on an indivdual who produced records pursuant to a subpoena issued by the Price Administrator, even though such records were required by law to be kept. That decision was reached on a plea in bar interposed in a criminal

contempt proceeding for violation of an injunction. An appeal was taken to the Court of Appeals for the District of Columbia under the Act of March 3, 1901, 6935 (D. C. Code 1940, § 23-105). We have, however, reached the conclusion that the local District of Columbia statute was supplanted pro tanto by the Criminal Appeals Act, as amended by the Act of May 9, 1942 (18 U. S. C., Supp. V, 682), (cf. United States v. Belt, 319 U. S. 521), and that the Criminal Appeals Act covers a plea in bar in a criminal contempt proceeding (United States v. Goldman, 277 U. S. 229). Under the Criminal Appeals Act. the appeal in the Hoffman case, from the judgment sustaining a plea in bar, should have been taken to this Court. We are consequently filing in the Court of Appeals a motion to have the case certified to this Court pursuant to the provisions of the Criminal Appeals Act.

Since the Hoffman case involves the identical question of law which is presented by the instant petition, and since we believe that that case will shortly be certified to this Court, it seems desirable that the instant case be considered together with the appeal in the Hoffman case. Accordingly, we concur in the granting of the petition for certiorari.

Respectfully submitted.

GEORGE T. WASHINGTON, Acting Solicitor General.

MARCH 1947.



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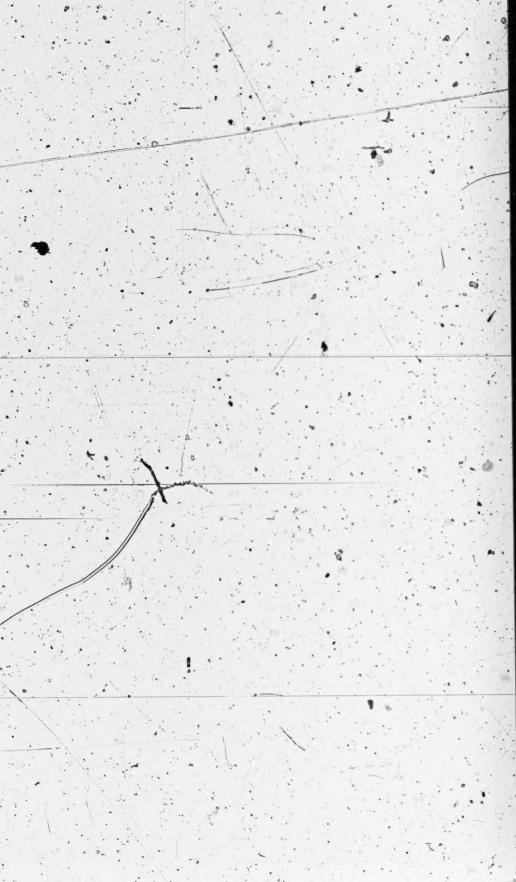
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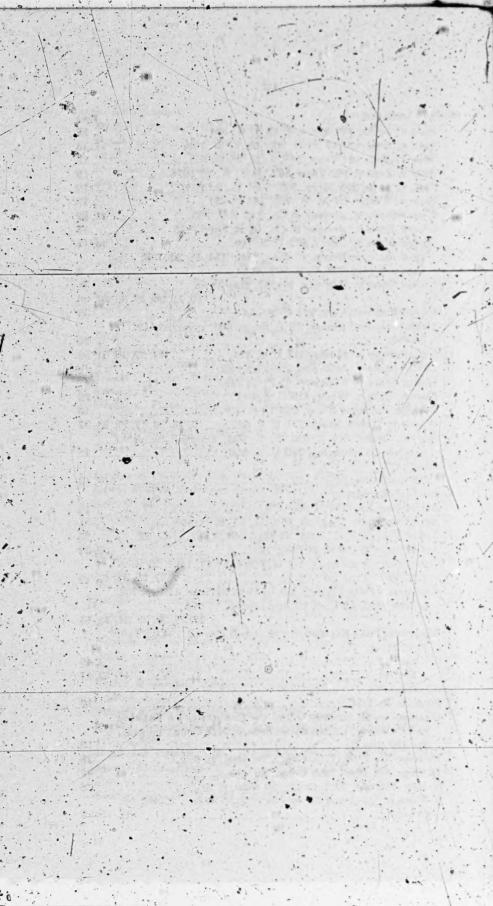


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### In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 49

WILLIAM SHAPIRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

#### OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 122-127) is reported at 159 F. 2d 890.

#### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 7, 1947 (R. 128). The petition for a writ of certiorari was filed on March 5, 1947, and was granted on June 2, 1947 (R. 128). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

#### QUESTIONS PRESENTED

Petitioner, in obedience to an administrative subpoena, produced business records which he had kept as required by a regulation promulgated by the Price Administrator. In this prosecution for violation of the Emergency Price Control Act, he interposed a plea in har, claiming that under Section 202 (g) of the Act, which substantially incorporates the provisions of the Compulsory Testimony Act of 1893, his production of these records gave him immunity from prosecution. This plea was overruled by the trial court, which was affirmed by the court below.

Two questions are presented:

- 1. Was petitioner entitled, because of his constitutional privilege against self-incrimination, to withhold these records, and hence did he obtain statutory immunity from prosecution by being compelled to produce them?
- 2. If so, does such immunity extend to the present prosecution, in view of the remoteness of the information contained in the records to the offenses with which petitioner was here charged?

### CONSTITUTIONAL PROVISION AND STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Fifth Amendment, the Emergency Price Control Act, the Compulsory Testimony Act, and Maximum Price Reg-

ulation 426 are set forth in the Appendix, pp. 43-47.

#### STATEMENT

Petitioner is engaged in the wholesale fruit and vegetable business in New York City (R. 63). During 1943 and 1944, he was subject to the terms of Maximum Price Regulation 426, which fixed ceiling prices on sales of fruits and vegetables at wholesale. On December 18, 1945, he was convicted in the United States District Court for the Southern District of New York on counts 7, 8, 9, 10, and 11 of a 48-count information which charged him with failure to comply with the regulation in violation of the Emergency Price Control Act (R. 2-31, 40). He was sentenced to pay a fine of \$1,000 on each count (R. 40). Each of the counts on which he was convicted alleged that at a specified time during the period from August through November 1943, petitioner made tie-in sales of fruits and vegetables to one Ernest Davino, requiring the latter to buy a commodity which he did not want as a condition to purchase of the desired product (R. 5-8).

Before trial, petitioner interposed a plea in bar, claiming immunity from prosecution by virtue of Section 202 (g) of the Emergency Price

<sup>&</sup>lt;sup>1</sup> Section 11 of the regulation specifically forbade evasion through the device of tie-in sales (see *infra*, p. 47). Cf. Kraus & Bros. v. United States, 327 U. S. 614, with United States V. George F. Fish, Inc., 154 F. 2d 798 (C. C. A. 2), certiorari denied, 328 U. S. 869.

Control Act, which substantially incorporates the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (infra, pp. 45-46) (R. 32-39). This plea was overruled by the trial court (R. 40), and the Circuit Court of Appeals for the Second Circuit affirmed (R. 128).

It appears from the plea in bar and the exhibits attached to it (and the allegations therein have not been denied by the Government) that on September 29, 1944, petitioner was served with a subpoena duces tecum and ad testificandum issued by the Price Administrator directing him to appear before certain named enforcement officials of the O. P. A. to testify concerning "all purchases and sales of fresh fruit and vegetables from September 1, 1944 to September 28, 1944" and requiring that he produce at the same time and place "all duplicate sales invoices, sale books, ledgers, inventory records, contracts and records relating to the sale of all commodities from September 1, 1944 to September 28, 1944" (R. 35) In compliance with the subpoena petitioner appeared before the designated officials on October 4, 1944. He was sworn and requested to turn over the subpoensed books and records. Upon inquiry from petitioner's counsel whether petitioner was being granted immunity "as to any and all matters for information obtained as a result of the investigation and examination of these records," the presiding official stated that the "witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to M. P. R.'s 271 and 426" (R. 37). Petitioner then made a formal statement for the record in which he claimed "my constitutional privilege," and immunity under the Emergency Price Control Act and the Compulsory Testimony Act of February 11, 1893 (R. 37). He thereupon opened the books and records in question to examination by officials of the Office of Price Administration (R. 37–38).

The plea in bar alleged in respect of counts 7 through 11 that the name of Ernest Davino, the purchaser in the transactions involved in those counts, appeared on the subpoenaed books and records in several instances (R. 34; see also, R. 38-39). In showing the connection between the September 1944 sales records and the offenses in 1943, petitioner alleged that "the Office of Price Administration used the evidence concerning the transactions respecting which I was immune from prosecution in obtaining the names and other leads and in preparing and searching out each and every evidence against me, and the United States Attorney in filing the information used the evidence so prepared and secured, as well as the leads therefrom" (R. 34).

In affirming the judgment of conviction, the Circuit Court of Appeals for the Second Circuit held that the constitutional privilege against selfby law to be kept, and that the statutory immunity granted by Section 202 (g) of the Emergency Price Control Act and the Compulsory Testimony Act of 1893 does not extend to one who has been compelled to produce records falling outside the scope of the constitutional privilege (R. 122-127).

#### SUMMARY OF ARGUMENT

1. That petitioner was required by Maximum Price Regulation 426 to preserve for examination appropriate records showing the prices he charged for commodities subject to the regulation, and that the record-keeping requirement of the regulation was lawful, are not in dispute.

The sales records which petitioner produced in obedience to the administrative subpoena were records which the regulation required him to keep. Such records, it is settled, are within the category of public papers, i. e., papers in which the public's interest extends beyond utilizing them as evidence in a particular case; they are therefore not constitutionally protected from disclosure to the appropriate governmental agency. The privilege against self-incrimination which applies to private documents does not extend to such public papers and records. Wilson v. United States, 221 U. S. 361, 380–382.

2. The question whether statutory immunity extends to one who discloses information which is not protected by the privilege against selfincrimination would appear to have been settled by Heike v. United States, 227 U. S. 131. In that case, this Court rejected the contention that the immunity granted by statute is broader than the privilege of the Fifth Amendment. Mr. Justice Holmes' opinion for the Court stated that the immunity statute "should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned." For "the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got," not to offer "a gratuity to crime" 227 U. S. at 142.

Clearly, therefore, petitioner obtained no immunity in exchange for the production of these records, which were required by law to be kept. For, like the corporate records involved in the Heike case, they are outside the constitutional privilege. Congress was under no obligation to grant immunity in order to obtain access to them; and there is no basis either in its language or legislative history for the inference that Section 202 (g) of the Price Control Act was intended to grant immunity where the information was not protected from disclosure by the constitutional privilege.

To suggest that Congress gratuitously conferred immunity in exchange for the disclosure of records which were required to be kept is to urge that Congress first granted the Adminis-

trator power to require appropriate records to be kept as a means for enforcing the statute and for uncovering violations, and that it then denied him access to the records unless immunity was granted for the offenses which they disclosed. The policy of the Act clearly is to exchange immunity for the privilege against self-incrimination only where the Constitution would otherwise stay the Administrator's hand in seeking information essential to the successful administration of the Act. So construed, the statute grants immunity to a person who gives incriminating oral testimony or produces documents which are privileged. It does not gratuitously extend immunity in exchange for the production of records required by law to be kept.

3. The sales records which petitioner was required to produce were for the month of September 1944. The offenses for which petitioner was convicted occurred in the fall of 1943. Petitioner's claim to immunity rests on the allegation—not disputed by the Government—that the records gave the Government a lead which eventually resulted in the discovery of the 1943 offenses. Petitioner points out that the disclosed records showed that one D'Avino was a customer of petitioner's in September 1944, and that the transactions for which he was convicted involved sales to D'Avino in 1943.

Assuming that petitioner is otherwise entitled to immunity, he has failed to show that the information he disclosed bore a substantial relation to the offenses for which he is here being prosecuted. The Compulsory Testimony Act (infra, p. 45) provides that "no person shall be prosefor or on account of any transcuted action, matter or thing, concerning which" he produced evidence. "When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." Heike v. United States, 227 U. S. 131, 144. The 1944 sales records did not reveal the 1943 offenses or any ingredient of them. The fact that D'Avino did business with petitioner was information of easy knowledge which was not incriminating, which was not private or secret in nature, and which was only remotely related to the offenses of which petitioner has been convicted.

## ABGUMENT

The principal question involved in this case and in its companion on appeal, United States v. Hoffman, No. 97, is whether statutory immunity from prosecution extends to one who is compelled to produce for inspection business records which

are required by law to be kept.' The Circuit Court of Appeals for the Second Circuit, in rejecting petitioner's claim to immunity, held that such records are not privileged from disclosure, and that statutory immunity is extended only in exchange for relinquishment of a constitutional privilege (R. 124-127). The district court in the Hoffman case reached a contrary conclusion on the ground that Section 202 (g) of the Emergency Price Control Act and the Compulsory Testimony Act of 1893 extend immunity to "any person who produces records in response to a subpoena issued by the administrative agency if the prosecution is to be based on information contained in such records," apparently without regard to whether the records are protected by the privilege against self-incrimination (No. 97, R. 29-30).

We submit that Congress clearly has power to require records to be kept as an aid to the administration and enforcement of its regulatory legislation, and that such records are public in nature and, unlike purely private records, are not protected by the privilege against self-incrimination. The immunity which is extended

There is no oral testimony involved in either case. We assume, arguendo, as did the court below (see R. 127), that the information disclosed by petitioner in response to the subpoena substantially concerns the offenses for which petitioner was convicted. But see Part III of the Argument, infra, pp. 39-42, where it is argued that, in fact, there is no such substantial connection.

by statute is granted only as a quid pro quo for information which is privileged from disclosure, and not as a gratuity to one who has no privilege to assert.

T.

THE BUSINESS RECORDS WHICH PETITIONER WAS COMPELLED TO PRODUCE WERE REQUIRED TO BE KEPT BY A LAWFUL REGULATION PROMULGATED BY THE PRICE ADMINISTRATOR; PETITIONER'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION DID NOT, THEREFORE, ENTITLE HIM TO WITHHOLD SUCH RECORDS

A. Section 202 (b) of the Act empowers the Administrator, "by regulation or order, to require any person who is engaged in the business. of dealing with any commodity make and keep records and other documents," to make reports and to permit inspection of such records. Pursuant to this authority the Administrator, in Maximum Price Regulation 426, effective July 20, 1943, 8 Fed. Reg. 9546 (infra, p. 46), required a person selling fresh fruits and vegetables for which maximum prices were established by the regulation to (1) preserve for examination his records, "including invoices, sales tickets, cash receipts, or other written evidence of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation," and (2) keep and make available for examination "records of the same kind as he has

customarily kept, relating to the prices which he charges for fresh fruits and vegetables." § 1439.3, Section 14 (a) and (b), infra, p. 47. The records called for by the subpoena and produced by petitioner were his records "relating to the sale of all commodities from September 1, 1944 to September 28, 1944" (R. 35, 37-38). Hence, they clearly were required by the regulation to be kept and to be opened for inspection by the Office of Price Administration.

We do not understand petitioner to challenge the record-keeping requirements of the Act and regulation, and, indeed, there could be no basis for such a challenge. For the object of Congress in authorizing the Administrator to require that appropriate sales records be kept and available for inspection was two-fold: to uncover violations of the law, and to facilitate the administration and enforcement of the Emergency Price Control Act. Such records furnish concrete and specific information as to the actual operation of the statute and regulations; they show the Administrator whether a regulation is, in practice, achieving its purpose; and they give him an information as for future action. Moreover, the task of en-

A detailed statement of the importance of the recordbeeping provision is contained in the brief submitted by the General Counsel of the Office of Price Administration and Civilian Supply to the Senate Committee considering the proposed price control legislation. Hearings on H. R. 5990 before the Committee on Banking and Currency, United States Senate, 77th Cong., 1st sess., pp. 192-194.

forcement is greatly facilitated by requiring sales records to be kept. The mere necessity for keeping records tends to discourage sales at prices in excess of those fixed by law. The availability of sales records likewise enabled the Administrator to ferret out those sellers who were unwilling to abide by the regulation, and to institute enforcement measures which would cleanse the market place of such persons and thus aid other sellers to do business in a lawful manner, This is an appropriate means to a lawful end. United States v. Darby, 312 U. S. 100, 125, and cases cited; Bowles v. Beatrice Creamery Co., 146 F. 2d 774, 779 (C. C. A. 10); Bowles v. Glick Bros. Lumber Co., 146 F. 2d 566, 570-571 (C. C. A. 9), certiorari denied, 325 U. S. 877; Bowles v. Insel, 148 F. 2d 91, 93 (C. C. A. 3).

It is significant that the record-keeping requirement here is limited to information bearing on the prices at which regulated commodities are sold. Petitioner was not required to keep records of his private affairs or even of his other business activities. His sole duty was to keep and make available for inspection records relating to the prices at which he sold price-controlled fruits and vegetables. By statute and regulation, petitioner knew in advance that if he sold fruits and vegetables for which maximum prices were fixed by the Administrator, he was obligated to keep appropriate sales records. See Coleman v. United

States, 153 F. 2d 400 (C. C. A. 6); Bowles v. Beatrice Creamery Co., 146 F. 2d 774 (C. C. A. 10). Petitioner recognized his duty, for he kept the required records and, when called upon, made them available to the Administrator.

B. We turn, now, to consideration of the major premise of petitioner's argument, namely, that his constitutional privilege against self-incrimination applied to the records which he was compelled to produce. By way of preface, some general observations on the scope of the constitutional privilege are appropriate. As has been stated by Mr. Justice Frankfurter: "Duty, not privilege, lies at the core of this problem—the duty to testify, and not the privilege that relieves of such duty. In the classic phrase of Lord Chancellor Hardwicke, 'the public has a right to every man's evidence." United States v. Monia, 317 U. S. 424, 432-433 (dissent). Professor Wigmore's survey of the origin and development of the privilege shows that it had no place in the common law prior to the middle of the 18th century, and that it was merely a qualification upon the duty to give testimony. 8 Wigmere, Evidence (3rd ed.) §§ 2250 et seg. And recent decisions of this Court, particularly, have emphasized that the privilege, embedded as it is in the Fifth Amendment, is essentially an expression of the law's protection of the individual's right of privacy. See United States v. White, 322 U. S. 694, 700;

Davis v. United States, 328 U. S. 582, 589-590. In the latter case, for example, Mr. Justice Frankfurter referred to the constitutional protection of "the right to be let alone except under responsible judicial compulsion," 328 U. S. at 596 (dissent).

For these reasons, therefore, the Fifth Amendment has never been held to justify refusal to produce papers other than those purely private and personal in character. Thus, corporate records are not protected by the privilege, Wilson v. United States, 221 U.S. 361; Hale v. Henkel, 201 U. S. 43, even where they are in the custody of a corporation officer who asserts the privilege in his own behalf. Wheeler v. United States, 226 U. S. 478; Essgee Co. v. United States, 262 U. S. 151; Wilson v. United States, supra; Grant v. United States, 227 U.S. 74. This applies equally to unincorporated labor unions. United States v. White, 322 U.S. 694. Moreover, there is the clear line of authority holding that individuals cannot, on grounds of constitutional privilege, refuse production of incriminating public records in their custody. Wilson v. United States, 221 U. S. at 380-382, and authorities there cited; People v. Coombs, 158 N. Y. 532; Bradshaw v. Murphy, 7 C. & P. 612; 8 Wigmore, Evidence (3rd ed.) 6 2259c.

In Boyd v. United States, 116 U. S. 616, decided more than sixty years ago, this Court recognized the distinction between "a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him'—which is prohibited by the Fourth and Fifth Amendments—and an examination by government agencies and officers of the entries [of the manufacture or custody of excisable articles] in books required by law to be kept for their inspection'—which is not prohibited (116 U. S. at 623-624). And the later case of Wilson v. United States, 221 U. S. 361, 380-382, removed any doubts on this score. The Wilson case held that an officer of a corporation was not privileged against the

The statute illustrates the practice, even as early as 1789, of requiring records to be kept both by persons engaged in activities subject to regulation and by public officers, and its enactment by the same Congress which proposed the Firth Amendment supports the settled doctrine of the Wilson case, that the Fifth Amendment does not extend to such records.

As the Court noted in the Boyd case, 116 U.S. at 623, the same Congress which proposed the original amendments to the Constitution provided in the Act of July 31, 1789, 1 Stat. 29-"An act to regulate the Collection of the Duties imposed by law on the tonnage of ships or yessels, and on goods, wares and merchandise imported into the United States"-that'the master of every vessel putting into a port of the United States from a fereign port shall deliver, upon demand, to any authorized officer described records concerning the passengers, cargo, and destination of the vessel. These records, in turn, were required to be entered in the books of the collector of revenue. Section 9 of the Act imposed a duty on the revenue officials to keep appropriate records and to open them for proper inspection. The books which the act required to be kept for inspection were thus books required to be kept by a public officer, but they included records made by the masters of the various ships.

production of corporate records in his possession, even though they might incriminate him. But in reaching this decision the Court relied heavily upon a doctrine that it regarded as well settled in the law. With abundant illustrations from the decided cases, both English and American, Mr. Justice Hughes, speaking for the Court, pointed out that the Fifth Amendment does not enable the custodian of records required to be kept by law to withhold them, even though they may incriminate him. The opinion stated (221 U.S. at 380):

The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.

Familiar illustrations of the principle are not hard to find. Thus, a druggist's records of his sales of liquor for "medicinal" purposes, State v. Donovan, 10 N. Dak. 203, or a pawnbroker's records of pledges, St. Joseph v. Levin, 128 Mo. 588, or the records of a licensed food dealer, United States v. Mulligan, 268 Fed. 893 (N. D. N. Y.), have been held outside the protection of the privilege. And never since the Wilson case has it been doubted that the Fifth Amendment does not insulate re-

quired records from being produced in obedience to a subpoena or other lawful order issued by the appropriate governmental body. See Davis v United States, 328 U. S. 582, 589-590, 593, 595-596, 602; Zap v. United States, 328 U. S. 624, 628, reversed on other grounds on rehearing, 330 U.S. 800; 8 Wigmore, Evidence, 3rd ed., Sec. 2259c, pp. 348-351; cf. Gouled v. United States, 255 U. S. 298, 308-309. Congress time and again has legislated at this assumption and has provided for the keeping and inspection of records, as in the Emergency Price Control Act. See the illustrative statutes collected in the opinion of the court below (R. 124); and see, e. g., United States v. Darby, 312 U. S. 100, 124-125 (Fair Labor Standards Act); Rodgers v. United States, 138 F. 2d 992 (C. C. A. · 6) (Agricultural Adjustment Act): C. M. Spring Drug Co. v. United States, 12 F. 2d 852, 857 (C. C. A. 8) (Harrison Narcotic Law); Bartlett Frazier Co. v. Hyde, 65 F. 2d 350, 352 (C. C. A. 7), certiorari denied, 290 U. S. 654 (Grain Futures Act); United States v. Mulligan, 268 Fed. 893 (N. D. N. Y.) (Lever Act); Ryan v. Amazon Petroleum Corp., 71 F. 2d 1, 8 (C/C. A. 5), reversed on other grounds, 293 U. S. 388 (National Industrial Recovery Act).

Statutes requiring businesses of various sorts to keep records and to submit to inspection of records and premises by designated officials are common to most states and have been consistently approved by the courts. State v. Davis, 108 Mo. 666, 18 S. W. 894; People v. Henwood, 128 Mich. 317, 82 N. W. 70; State v. Donovan, 10 N. D. 208, 86 N. W. 709;

In dealing with the record-keeping requirement of the Emergency Price Control Act, the lower

State v. Davis, 68 W. Va. 142, 68 S. E. 639 (records of sales of liquor); Hughes v. State, 67 Tex. Crim. R. 333, 149 S. W. 173 (records of shipments of liquor); State v. Legora, 162 Tenn. 122, 84 S. W. 2d 1056; note at 80 A. L. R. 1486 (records of purchases and sales of scrap metal); City of St. Joseph v. Levin, 128 Mo. 788, 31 S. W. 101; Financial Aid Corp. v. Wallace, 23 N. E. 2d 472 (Ind.) (records of transactions of pawn brokers); Aston v. State, 27 Tex. App. 574, 11 S. W. 637; State v. Walker, 34 N. M. 405, 281 P. 481 (records of slaughtered livestock); Dunham v. Ottinger, 243 N. Y. 423, 154 N. E. 298, error dismissed, 276 U. S. 592 (inspections by Attorney General, at his discretion, of stock transactions); Albert v. Milk Control Board, 210 Ind. 283, 200 N. E. 688 (authorizing the Board to investigate any "facts to enable the Board to administer this act," and, as an incident thereto, to inspect all pertinent books, records, papers, etc); State v. Stein, 215 Minn. 308, 9 N. W. 2d 763 (records of purchases of raw fur). See also State ex rel. Davis v. Rose, 97 Fla. 710, 122 So. 225 (records to be kept by real estate brokers); Parks v. Laurens Cotton Mills, 75 S. C. 560, 56 S. E. 234 (cotton buyers); Reaves Warehouse Corp. v. Commonwealth, 141 Va. 194, 126 S. E. 87 (tobacco warehouses); and Culver v. Smith, 74 S. W. 2d 754 (Tex. Civ. App.), upholding the authority of a state commission to examine the books and records of all companies engaged in the petroleum industry, and in so doing, pointing to the distinction between private papers and those of a business which is being regulated by the government.

For related cases, see, as to requirements of operators of motor vehicles in case of accident, *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530; displaying licenses on motor vehicles, *People v. Schneider*, 139 Mich. 673, 103 N. W. 172; records in connection with regulation of hours an operator of a motor truck or bus may be on duty, *People v. Creeden*, 281 N. Y. 413, 24 N. E. 2d 105; game warden inspection of killor catch of fish, *State v. Hall*, 164 Tenn. 548, 51 S. W. 2d

851. and State v. Bennett, 315 Mo. 1267.

federal courts have recognized its validity and utility and, where necessary, have come to the aid of the Administrator in enforcing it. Cudmore v. Bowles, 145 F. 2d 697, 698-699 (App. D. C.), certiorari denied, 324 U. S. 841; Porter v. Mueler, 156 F. 2d 278, 279-281 (C. C. A. 3); Bowles v. Insel, 148 F. 2d 91, 93 (C. C. A. 3); Bowles v. Glick Bros. Lumber Co., 146 F. 2d 566, 570-571 (C. C. A. 9), certiorari denied, 325 U. S. 877; Hagen v. Porter, 156 F. 2d 362, 367 (C. C. A. 9), certiorari denied, 329 U. S. 729; Amato v. Porter, 157 F. 2d 719, 721 (C. C. A. 10), certiorari denied, 329 U. S. 812; Bowles v. Beatrice Creamery Co., 146 F. 2d 774 (C. C. A. 10). See also, Coleman v. United States, 153 F. 2d 400, 403 (C. C. A. 6).

The case is thus one of a seller who furnished no oral testimony and who was required to and did furnish for inspection only sales records required by appropriate regulation to be kept.

<sup>\*</sup>Among the various decisions of the district courts, see, particularly, United States v. Kempe, 59 F. Supp. 905, 908-910 (N. D. Iowa); reversed on another ground, 151 F. 2d 680 (C. C. A. 8); Bowles v. Chew, 53 F. Supp. 787 (N. D. Calif.); Bowles v. Misle, 64 F. Supp. 835 (D. Neb.); Bowles v. Seitz, 62 F. Supp. 773 (W. D. Tenn.); Bowles v. Sachnoff, 65 F. Supp. 538 (W. D. Pa.).

more clearly demonstrated if, as is conventional under many types of federal and state regulation, he had been required by law to forward periodic reports to the Administrator as to his sales, customers' names and addresses, etc. His argument here would logically drive petitioner to the obviously

The records, it is plain, are not private papers and hence are not protected by the Fifth Amendment. The question which remains is whether petitioner is entitled to statutory immunity from prosecution for disclosing record which he had no constitutional right not to disclose.

## II

SINCE CONSTITUTIONAL PRIVILEGE AND STATUTORY IMMUNITY ARE CORRELATIVE, PETITIONER OBTAINED NO IMMUNITY UNDER SECTION 202 (G) IN EX-CHANGE FOR PRODUCING THESE RECORDS

The question whether statutory immunity extends to the compelled disclosure of unprivileged information is one which is common to the many immunity provisions in the federal laws. It is a question which must be resolved not only by looking to the words of the statute, as Judge Holtzoff did in the Hoffman case, but also by viewing the immunity provisions in the context of their constitutional background. For the constitutional privilege is the very subject of the immunity statutes. The "policy as well as the letter of the law is a guide to decision." Markham v. Cabell, 326 U. S. 404, 409.

untenable contention that such reports could also not be utilized by the Administrator without clothing petitioner with an immunity from prosecution for offenses disclosed by the reports. Regulations permit records to be retained, rather than filed, largely for the convenience of the persons regulated.

If a public official may obtain statutory immunity for disclosing public records in response to a subpoena, then petitioner, too, is entitled to such immunity. If prior to the Act of June 30, 1906, 34 Stat. 798, a corporation was entitled to immunity for producing corporate records,10 or if an officer of a corporation is entitled to such immunity for producing, incriminating corporate records," the same immunity is due petitioner. If in other like situations a person may obtain immunity for disclosing information, in response to a subpoena, which he has no right not to disclose, petitioner, too, is entitled to such a gratuity. But if, as this Court has held, "the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got" (Heike v. United States, 227 U. S. 131, 142), it

See Wilson v. United States, 221 U.S. 361, 380.

existing immunity provisions. Since corporations are not protected by the privilege against incrimination (Wilson v. United States, 221 U. S. 361, 372-374), the 1906 Act, in declaring the Congressional purpose in the earlier statutes (see Mr. Justice Frankfurter dissenting in United States v. Monia, 317 U. S. 424, 437-438) specifically provided that immunity should extend "only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

<sup>10</sup> See Hale v. Henkel, 201 U. S. 43, 69; United States v. Armour & Co., 142 Fed. 808, 817 (N. D. 11.).

<sup>&</sup>lt;sup>11</sup> See Wilson v. United States, supra, at pp. 384-385; Baltimore and Ohio R. R. v. Int. Com. Comm., 221 U. S. 612, 622-623; Oklahoma Press Publ. Co. v. Walling, 327 U. S. 186, 205, 208; United States v. White, 322 U.S. 694.

follows that the "gratuity to crime" which petitioner seeks is beyond his reach.

The arguments here closely resemble the contending arguments in the Heike case.12 case, the defendant, who had been indicted for frauds on the revenue and conspiracy to commit such frauds, pleaded in bar that he had testified and produced documentary evidence consisting of corporate records in response to a government subpoena in a grand jury investigation of alleged violations of the Sherman Act. He contended that the words of the statute—that no person should be prosecuted for any matter "commerning which he may testify or produce evidence"-were broad enough to give him amnesty from liability for every offense connected in any degree with the matter concerning which he had testified, or at least for every offense toward the discovery of which his testimony led, even if it had no actual effect in bringing about the discovery (227 U.S. at 141). port of this contention he argued that the immunity statute bore no analogy, either in conditions of acquirement or in mode of operation, to the constitutional privilege (227 U.S. at 132); and that, Congress intended the immunity provision as a reward, permitting some guilty per-

<sup>&</sup>lt;sup>42</sup> The *Heike* case was concerned with the immunity provision of the Act of February 25, 1903, 32 Stat. 904 (15 U.S. C. 32), rather than the Compulsory Testimony Act of 1893 which is involved in the present case. But this Court stated that both statutes reflect the same policy considerations, 227 U.S. at 142, even though their words are not the same in all respects.

sons to escape in order to secure the evidence desired (227 U. S. at 141). The Government contended, on the other hand, that the statute should be limited by the boundaries of the constitutional privilege.

Rejecting the defendant's argument that the immunity statute was to be construed more broadly than the constitutional privilege, Mr. Justice Holmes, speaking for a unanimous Court, said (227 U. S. at 142):

Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443, which read "No person shall be excused from attending and testifying," &c. "But no person shall be prosecuted," &c., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, was not coextensive

with the constitutional privilege.' American Lithographic Co. v. Werckmeister, 221 U. S. 603, 611. Compare act of February 19, 1903, c. 708, § 3, 32 Stat. 847, 848. To illustrate, we think it plain that merely testifying to his own name, although the fact is relevant to the present indictment as well as to the previous investigation, was not enough to give the petitioner the benefit of the act. See 3 Wigmore, Evidence, § 2261.

The Court did not deny that the language of the statute, if given a literal construction, was broad enough to reach the information which the defendant disclosed. In a loose sense, the evidence could have been said to "concern" a "transaction, matter, or thing," for which the defendant was prosecuted. And nothing in the statute specifically withdrew statutory immunity from one who under compulsion disclosed corporate records. But applying the statute in the spirit of the constitutional privilege, for which it was designed to be a full exchange, the Court rejected the immunity plea for the reasons "that apart from the statute the petitioner could not have prevented the production of the books or papers of the company, such as the summary was when made, or refused it if he had the custody of them, and that the decisions that established the duty to produce go upon the absence of constitutional privilege, not upon the ground of statutory immunity in such a

case"; and that the evidence in the former proceeding "did not concern the present one and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it" (227 U. S. at 142-143).

Thus the Heike case held that the statute gave immunity only for evidence that was privileged. although the statute itself did not contain any such express limitation. Neither unprivileged corporate records nor evidence which was not incriminating in the constitutional sense were regarded as within the reach of the immunity statute. The same reasoning when applied to this case leads to the result that no immunity is given by the statute for the production of required records. For, like corporate records, they are outside the constitutional privilege. This is the rationale of the decision below and of the decision of the Circuit Court of Appeals for the Tenth Circuit in Amato v. Porter, 157 F. 2d 719, certiorari denied, 329 U. S. 812. And it is the. view which we urge here.

The contrary view, which was expressed by Judge Holtzoff in United States v. Hoffman," No. 97, recognized that to grant immunity in exchange for unprivileged information "would frequently defeat criminal prosecutions and contempt

<sup>&</sup>lt;sup>18</sup> See also, Porter v. Wright, 69 F. Supp. 46, 47-48 (D. Ore.).

proceedings brought to enforce the Emergency Price Control Act and the regulations issued thereunder," but this was justified on the ground that, "If the Congress made the immunity provision so broad as to hamper and perhaps at times frustrate enforcement, Congress alone can provide the remedy" (No. 97, R. 27). While the literal language of the Compulsory Testimony Act "possibly may be so read, reference to the controlling provision in Section 202 (g) of the Emergency Price Control Act demonstrates, we think, that Congress did not make the grant of immunity "so broad."

There is no basis either in its language or legislative history for the inference that Section 202 (g) was intended to grant a broader immunity than the constitutional privilege. Section, 202 (infra, pp. 43-45) empowers the Administrator to require records to be kept, to make studies and

<sup>&</sup>lt;sup>14</sup> The Compulsory Testimony Act of February 11, 1893, 27 Stat. 433, 49 U. S. C., provides:

<sup>&</sup>quot;No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission." on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."

investigations, and to issue subpoenas, and in subsection (g) the statute provides:"

> No person shall be excused from complying with any requirements under this section because of his privilege against selfincrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, Title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege. [Italics supplied.]

The "obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got" (Heike v. United States, 227 U. S. 131, 142). It contemplates that no person

<sup>18</sup> The Committee Reports (H. Rep. No. 1409, 77th Cong., 1st sess., p. 9; S. Rep. No. 981, 77th Cong., 2d sess., p. 21) explain the evident purpose of Section 202 as follows:

"Although no person is excused from complying with any requirement of this subsection because of his privilege against self-incrimination, the immunity provisions of the Compulsory Testimony Act of February 11, 1898, are made applicable with respect to any individual who specifically

claims such privilege."

<sup>&</sup>quot;Section 202 (a) authorizes the Administrator to make studies and investigations and to obtain the economic and other data necessary or proper in prescribing maximum price, rent, and other regulations and orders, and in the administration and enforcement of such regulations and orders and of the provisions of the bill. This authority may be enforced through the usual forms of compulsory process and the power to inspect and copy documents, inspect inventories and defense area housing accommodations. The power to require by regulation or order the keeping of records and the making of reports is also granted by this subsection.

shall be able to avoid disclosure because of the protection of the Fifth Amendment. In the manner approved in Brown v. Walker, 161 U. S. 591, the statute exchanges immunity for the witness' surrender of his privilege not to incriminate himself. To avail himself of the protection of Section 202 (g), the witness must specifically claim "such privilege"; he shall not be excused from compliance with the requirements of Section 202 of the Act "because of his privilege against self-incrimination." The fundamental assumption of the provision is that the witness possesses a privilege which he must first claim and then relinquish in exchange for statutory immunity.

The Hoffman decision fails to meet the language of Section 202 (g). It fails to recognize that the provision incorporates the Compulsory Testimony Act only for the benefit of the person "who specifically claims such privilege." Quite plainly,

<sup>&</sup>quot;The Act thus avoids the question decided in *United States* v. *Monia*, 317 U. S. 424, whether in the absence of specific statutory language requiring a witness to claim his privilege against self-incrimination, the witness must assert the claim as a condition precedent to the flow of immunity.

There is, in addition, a basic difference here from the Monia case. The latter case involved the compulsory production of information which was within the protection of the Fifth Amendment, and the question was whether Congress intended to impose on the witness the responsibility for asserting his privilege or whether it intended the Government to assume the risk that the witness might obtain immunity as a result of testimony which possibly might not have been compelled if it were understood that immunity was

Section 202 (g) does not mean that a person who spuriously claims the privilege is entitled to the benefit conferred by the Compulsory Testimony Act. The privilege which he asserts must be "his." If a witness asserts the privilege with respect to information which is protected from disclosure, he has satisfied the requirement of Section 202 (g) and is entitled to whatever immunity flows from the Compulsory Testimony Act. But if the witness has no privilege to assert, there is no occasion for resort to the Compulsory Testimony Act.

In the present case, petitioner had no privilege not to disclose the records of his sales. Therefore, he could not validly seek to be excused from disclosing his records "because of his privilege against self-incrimination," and, of course, he could not "specifically claim such privilege." He is thus not a person who is entitled to claim immunity under the Compulsory Testimony Act.

But even apart from the specific language of Section 202 (g), the *Hoffman* decision does not, we submit, correctly interpret the Congressional

the price for the testimony. The present case, unlike the Monia case, does not involve information which is within the protection of the privilege against self-incrimination. Petitioner had no constitutional right not to disclose the sales records which were subposensed. Thus, there are no conflicting policy considerations. The question is simply whether for unexplained reasons Congress conferred immunity on persons like petitioner even though the Constitution did not require it.

purpose which underlies the Compulsory Testimony Act, the provisions of which are incorporated by reference into Section 202. It fails to recognize the plain intent of Congress to give only. such immunity as was necessary to obtain information that otherwise "could not be got." Heike v. United States, 227 U.S. at 142. The history of the immunity legislation, which is set forth at length in the opinions in United States v. Monia, 317 U.S. 424, 427, 429, 431-434," demonstrates that from the first immunity statute in 1857 to the Compulsory Testimony Act of 1893, and thereafter, Congress sparingly granted immunity. In Counselman v. Hitchcock, 142 U.S. 547, the Act of February 25, 1868, 15 Stat. 37, R. S. 860, was held unconstitutional because Congress failed to grant full immunity in exchange for compelled testimony. The Compulsory Testimony Act undertook to meet the requirements of Counselman v. Hitchcock, supra, by providing full immunity in exchange for compelled testimony. "And in 1896 this Court. in Brown v. Walker, 161 U. S. 591, 595, found that the 1893 Act 'sufficiently satisfies the constitutional guarantee of protection.' There was no indication of any belief that Congress had given anything more than it had to give-and, indeed, only a bare majority of the Court thought that the statute had given as much as the Constitution

<sup>&</sup>lt;sup>17</sup> S also the Brief for the United States, pp. 9-29, No. 248, O. T. 1942,

required." United States v. Monia, supra, at 434 (dissenting opinion).

A few years later when District Judge Humphrey in United States v. Armour & Co., 142 Fed. 808 (N. D. Ill.), held that the immunity statute was broader than the Constitutional privilege and extended immunity to corporate officers who voluntarily submitted corporate books and records to inspection. Congress, at the request of the President, promptly enacted the Act of June 30, 1906, 34 Stat. 798. The 1906 Act, expressing the Congressional purpose of the immunity statutes of 1893 and 1903, to exchange immunity only for privileged information, restricted the grant of immunity to natural persons who were compelled to give testimony or information under oath." The Act demonstrates that Congress did not intend to give more than the Constitution required. In the words of Mr. Justice Holmes, speaking for the Court in the Heike case, 222 U.S. at 142, the legislative purpose requires that the immunity statute involved in that case (as well as the Compulsory Testimony Act) "should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned."

This question is involved in *Peters* v. *United States*, No. 256, pending on petition for certiorari, and the Government's Brief in Opposition in that case deals at some length with the history and purposes of the 1906 Act.

The sole object of the immunity legislation was to enable the Government to compel testimony which could not otherwise be obtained because of the privilege. If the information sought from a witness was not privileged, there was no necessity for granting immunity. Nothing in the legislative history of the Compulsory Testimony Act or of the Emergency Price Control Act indicates that Congress intended to reward the disclosure of unprivileged testimony by a grant of immunity. In the absence of clear indications of benevolence on the part of Congress, there is no basis, we submit, for assuming that Congress intended to defeat its very purpose of making administration of the laws more effective by gratuitously immunizing individuals without the desired advantage of securing testimony which the Government would not otherwise have been able to get!

The structure of the Compulsory Testimony Act itself suggests that Congress exchanged immunity for privileged information. "No person shall be excused." from giving incriminating evidence; "But no person shall be prosecuted" for anything concerning which he produces evidence. Freedom from prosecution was the quid pro quo for disclosing privileged information.

Many of these considerations were persuasively pressed upon the Court in Heike v. United States, supra, as demonstrating that there is "no reason for supposing that the act offered a gratuity to

crime" (227 U.S. at 142). These are also the considerations to which we believe the district court gave insufficient heed in the Hoffman case.

There are other considerations as well. 1942, when the Emergency Price Control Act was enacted, the doctrine that records required by law to be kept are not free from compulsory disclosure was firmly rooted in the law. As we have shown, supra, p. 18, it was the regular practice for Congress to empower the various administrative agencies to require the keeping of records which were reasonably necessary to the successful administration of the statutes in question. And the courts, relying on the Wilson decision, time and again had held that such records were not private; that the Government was entitled to access to them, for they were public in character. It was with this background that Congress wrote the record-keeping requirements into the Emergency Price Control Act, and in the very same section of the statute adopted the immunity provisions of the Compulsory Testimony Act for the benefit of any person who sought to be excused from furnishing information "because of his privilege against self-incrimination" and "who specifically claims such privilege." The language of Section 202 (g), considered against this background, indicates that, in incorporating by reference the provisions of the Compulsory Testimony Act, Congress understood the later Act not to

grant immunity broader than the constitutional privilege.

To accept petitioner's position means that Congress required records to be kept as a means for securing enforcement of the statute and vet tied the hands of the Administrator in taking enforcement action by granting immunity to every person who was compelled to disclose his required records to the Administrator. In 1942, it was, plain that a grant of immunity was not necessary with respect to required records. Nothing in the history of the Price Control Act suggests that those who drafted and enacted it into law thought otherwise." To suggest in these circumstances that Congress gratuitously conferred immunity in exchange for disclosure of records which were required to be kept is to urge that Congress took away with one hand what it granted for a purpose with the other. Nothing in the law requires a court to attribute such an intention to Congress.20 To the contrary, it is

<sup>19</sup> See fn. 3, supra, p. 12.

<sup>&</sup>lt;sup>20</sup> Compare Glickstein v. United States, 222 U. S. 139, in which it was contended that the immunity provision of subdivision 9 of Section 7 of the Bankruptcy Act of 1898 foreclosed a prosecution for perjury committed by the bankrupt when examined under it: The statute required the bankrupt to "submit to an examination concerning the conducting of his business \* \* \*; but no testimony given by him shall be offered in evid nce against him in any criminal proceeding." It was argued that because the provision did not except a prosecution for perjury from the immunity granted, the defendant obtained immunity from prosecution. This

the responsibility of the courts to read the provisions of the act together and to give meaning to each. Unreasonable results are to be avoided, not sought for. United States v. Kats, 271 U. S. 354; Church of the Holy Trinity v. United States, 143 U. S. 457. Considering the emergency nature of the legislation and the settled state of the law on the question in 1942, Congress intended, we submit, to exchange immunity only for information which otherwise was unavailable. It did not intend to give an invaluable something for nothing, and it did not use language which requires such a bounty.

This does not mean that Congress unnecessarily included an immunity provision in the statute. The Administrator was empowered by Section 202 (a) to make such studies and investigations as he deemed necessary or proper to assist him in prescribing any regulation or order or in the administration or enforcement of the act and regulations. And he possessed the power to subpoena a person to testify or produce records. The immunity provision of Section 202 (g) was inserted to insure a full exercise of these powers

Court regarded the question as being, "Does the statute, in compelling the giving of testimony, confer an immunity wider than that guaranteed by the Constitution?" 222 U.S. at 142. The contention was rejected notwithstanding the unqualified language of the immunity clause, because the Congressional purpose to compel the giving of truthful information would otherwise be frustrated.

unhampered by the assertion of the privilege against self-incrimination. Whenever information is sought which is protected by the Fifth Amendment and the privilege is claimed, immunity is exchanged for privileged facts. Thus, for example, the immunity provision reaches compelled oral testimony (see United States v. Armour and Co., 64 F. Supp. 855 (E. D. Pa.)), or the compelled disclosure of records which are not required by law to be kept. Cf. Wilson v. United States, supra, at pp. 284-385. Thus, in some cases, persons from whom information is sought may not be subject to a regulation requiring described records to be kept. This was particularly so in the earlier stages of price control when controls were being planned, and it was essential to ascertain vital facts as a foundation for shaping the necessary controls. Even thereafter, not all business records were required records. Once the Administrator compelled the disclosure of private records, there was a flow of immunity in return.

Along these same lines, the court below emphasizes (R. 126-127) an additional factor which suggests the unreasonableness of the position for which petitioner contends:

\* \* It has now been made clear by authoritative rulings that the administrative agencies have no power to secure the documents, even though required by law, through the process of a general search and seizure of a custodian's premises/but may

obtain them only, if consent is not given, by a subpoena." This was so held in Bowles v. Beatrice Creamery Co., 10 Cir., 146 F. 2d 774, which was cited and followed in both Judge L. Hand's and Judge Frank's opinions in United States v. Davis, 2 Cir., 151 F. 2d 140; and these views, in turn, were approved by Mr. Justice Frankfurter for the dissenting justices in Davis v. United States, 66 S. Ct. 1256, and were not questioned by the majority. Indeed, the subpoena is the only remedy stated in the statute itself, §§ 202 (b) and (c). Hence here the price officials were taking the statutory course and the only legal course, against a refusal or the qualified refusal represented by the claim of immunity. To hold that the power to subpoena is subject to a grant of immunity from prosecution would thus destroy the only sure method by which the agencies may inspect the recorded in their enforcement duties. Such a holding would destroy the value of record-keeping requirements—which are unquestionably valid. United States v. Sullivan, 274 U. S. 259by, making their use dependent upon the waiver by suspected wrongdoers of the privilege against self-incrimination. cannot ascribe to Congress so capricious a grant of an important regulatory power.

<sup>\*</sup>But see G. H. Love Inc. v. Fleming, 161 F. 2d 726 (C. C. A. 9), pending upon petition for a writ of certiorari, No. 238.

Neither the Hoffman decision nor petitioner's arguments suggest any plausible reason why Congress should have granted immunity for information which was not privileged. The language of Section 202 (g) more than points in the other direction. And, as this Court recognized in the Heike case, the language of the Compulsory Testimony Act does not compel the conclusion that Congress granted a "gratuity to crime." When, in addition to the words of the statutes, consideration is given, as it should be, to the legislative purpose, it becomes apparent, we believe, that to accept petitioner's view is to frustrate the legislative will and unnecessarily hamper the administration and enforcement of important statutes. It would excuse wrongdoing without obtaining in return any benefit.

## III

IN ANY EVENT, EVEN IF PETITIONER OBTAINED SUCH IMMUNITY, IT DID NOT BAR THE PRESENT PROSECUTION, IN VIEW OF THE REMOTENESS OF THE INFORMATION CONTAINED IN THE RECORDS TO THE OFFENSES WITH WHICH PETITIONER WAS HERE CHARGED

The foregoing discussion has proceeded on the assumption, arguendo, that the books and records which petitioner was compelled to disclose concerned the illegal transactions for which petitioner was convicted. See fn. 2, supra, p. 10. But in

fact the offenses for which petitioner was convicted occurred in 1943, approximately a year prior to the sales to which the subpoenaed documents relate. As we have shown in the Statement. supra, p. 4, petitioner was required to produce his sales records for the month of September 1944. None of the offenses of which he was convicted relates to sales in this period. Petitioner alleges, however, that the Government's examination of his sales records for September 1944 yielded a lead which ultimately revealed the offenses in 1943 for which he was convicted. He asserts that among the sales records disclosed in response to the subpoena were records of sales to one. D'Avino (see R. 99-103). By securing this customer's name, it is alleged the Government was enabled to confact him and secure information concerning other transactions prior and subsequent to the period covered by the subpoena. These allegations, which the Government did not dispute, were contained in petitioner's plea in bar (R. 31-35).

The pertinent language of the Compulsory Testimony Act (infra, p. 46) is that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on acount of any transaction, matter or thing, concerning which he may testify, or produce evidence "." This Court has said that "When the statute speaks of testimony concerning a matter it means

concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." Heike v. United States, 227 U.S. 121, 144.

When petitioner complied with the subpoena and produced his sales records for September 1944, he did not furnish evidence concerning the 1943 offenses. None of the records in any way disclosed or tended to disclose those crimes or even that petitioner did business with D'Avino in 1943. The fact that the subpoenaed records indicated that D'Avino was a customer of petitioner's in September 1944 is not, we submit, evidence in a "substantial way" concerning the. transactions in 1943 for which petitioner has been convicted. The information undoubtedly would not have been regarded as incriminating if it had been sought from petitioner as a witness in a judicial proceeding. For it did not reveal any ingredient of the 1943 offenses. Cf. Mason v. United States, 244 U. S. 362; United States v. Weinberg, 65 F 2d 394 (C. C. A. 2).

The fact that D'Avino did business with petitioner in September 1944 was information of easy knowledge. So far as the record indicates, the business relationship between petitioner and D'Avino was open and well known. D'Avino regularly came to petitioner's place of business to purchase fruits and vegetables (see R. 43-46,

64). Anyone who was interested in knowing who petitioner's customers were need only have observed them coming to or leaving from petitioner's place of business. The fact that D'Avino bought fruits and vegetables from petitioner was not private information. It was not a fact which petitioner sought to or could keep secret.

To argue, as petitioner does, that the incidental revelation that D'Avino was his customer in September 1944, is so incriminating that he is entitled to immunity is to seek immunity for something much less than information in a "substantial way" concerning the offenses for which petitioner was convicted.

## CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.
PHILIP ELMAN.

Special Assistant to the Attorney General.

ROBERT S. ERDAHL, IRVING S. SHAPIRO.

Attorneys.

**OCTOBER 1947.** 

## APPENDIX

1. The Fifth Amendment provides in pertinent part:

No person \* \* shall be compelled in a criminal case to be a witness against himself.

2. Section 202 of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C., App. Supp. V, 922, provides:

(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the

<sup>&</sup>lt;sup>1</sup> The specific power to conduct hearings and the provisions of subsection (i) were added to the section by Section 105 of the Stabilization Extension Act of 1944, 58 Stat. 637. See H. Rep. No. 1698, 78th Cong., 2d sess,

inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at

any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to

any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpensed under this section shall be paid the same fees and mileage as are paid witnesses in the district

courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the

national defense and security.

(i) Any person subpensed under this section shall have the right to make a record of his testimony and to be represented by counsel.

3. The Compulsory Testimony Act of February 11, 1893, 27 Stat. 443, 49 U.S. C. 46, provides:

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or

proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and seventy-seven, or of any Amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine

and imprisonment.

4. Maximum Price Regulation 426, issued July 10, 1943, 8 Fed. Reg. 9546, provided:

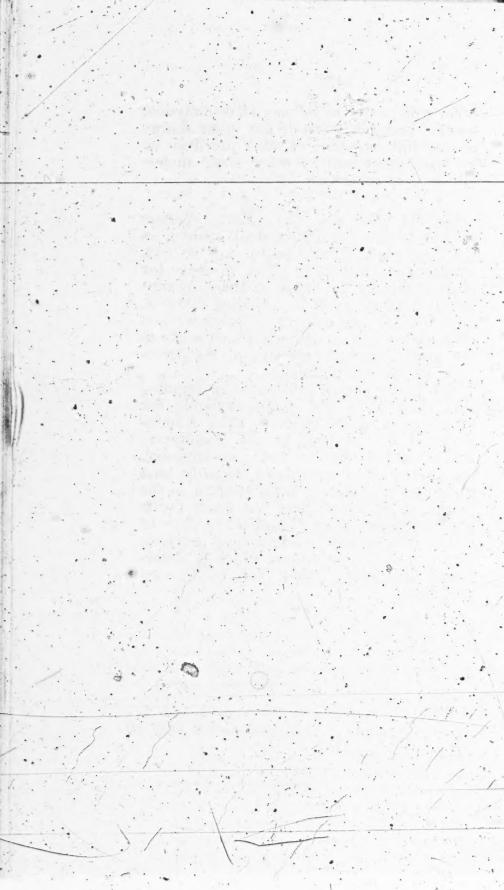
Sec. 11. Evasion. The price limitations which are set forth in this regulation shall not be evaded, whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any

other commodity or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise.

Sec. 14. Records. (a) Every person subject to this regulation shall, so long as the Emergency Price Control Act of 1942, as amended, remains in effect, preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts, or other written evidences of sale or delivery which relate to the prices charged pursuant to the provi-

sions of this regulation.

(b) Every person subject to this regulation shall keep and make available for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept, relating to the prices which he charges for fresh fruits and vegetables after the effective date of this regulation and in addition as precisely as possible, the basis upon which he determined maximum prices for these commodities.



## SUPREME COURT OF THE UNITED STATES

No. 49.—Остовек Текм, 1947.

William Shapiro, Petitioner, On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 21, 1948.]

Mr. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Petitioner was tried on charges of having made tie-in sales in violation of regulations under the Emergency Price Control Act.¹ A plea in bar, claiming immunity from prosecution based on § 202 (g) ² of the Act, was overruled by the trial judge; judgment of conviction followed and was affirmed on appeal. A contrary conclusion was reached by the district judge in *United States* v. Hoffman, post p.— Because this conflict involves an important question of statutory construction, these cases were brought here and heard together. Additional minor considerations involved in the Haffman case are dealt with in a separate opinion.

<sup>&</sup>lt;sup>1</sup> 56 Stat. 23, as amended, 50 U.S. C. App. (Supp. V, 1946) § 901.

<sup>&</sup>lt;sup>2</sup> "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February F1, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege."

The Compulsory Testimony Act of 1893 provides: "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission... on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena..."

The petitioner, a wholesaler of fruit and produce, on September 29, 1944, was served with a subpoena duces tecum and ad testificandum issued, by the Price Administrator, under authority of the Emergency Price Control Act. The subpoena directed petitioner to appear before designated enforcement attorneys of the Office of Price Administration and to produce "all duplicate sales invoices, sales books, ledgers, inventory records, contracts and records relating to the sale of all commodities from September 1st, 1944, to September 28, 1944." In compliance with the subpoens, petitioner appeared and, after being sworn, was requested to turn over the subpoensed records. Petitioner's counsel inquired whether petitioner was being granted immunity "as to any and all matters for information obtained as a result of the investigation and examination of these records." The presiding official stated that the "witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to M. P. R.'s 271 and 426." Petitioner thereupon produced the records, but claimed constitutional privilege.

Section 14 of Maximum Price Regulation 426, 8 Fed. Reg. 9546 (1943) provides:

<sup>&</sup>quot;Records. (a) Every person subject to this regulation shall, so long as the Emergency Price Control Act of 1942, as amended, remains in effect, preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts, or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation.

<sup>&</sup>quot;(b) Every person subject to this regulation shall keep and make available for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept, relating to the prices which he charges for fresh fruits and vegetables after the effective date of this regulation and in addition as precisely as possible, the basis upon which he determined maximum prices for these commodities."

The plea in bar alleged that the name of the purchaser in the transactions involved in the information appeared in the subpoenaed sales invoices and other similar documents. And it was alleged that the Office of Price Administration had used the name and other unspecified leads obtained from these documents to search out evidence of the violations, which had occurred in the preceding year.

The Circuit Court of Appeals ruled that the records which petitioner was compelled to produce were records required to be kept by a valid regulation under the Price Control Act; that thereby they became public documents, as to which no constitutional privilege against self-incrimination attaches; that accordingly the immunity of § 202 (g) did not extend to the production of these records and the plea in bar was properly overruled by the trial court. 159 F. 2d 890.

It should be observed at the outset that the decision in the instant case turns on the construction of a compulsory testimony-immunity provision which incorporates by reference the Compulsory Testimony Act of 1893. This provision, in conjunction with broad record-keeping requirements, has been included not merely in a temporary wartime measure but also, in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government.

<sup>\*</sup>Some of the statutes which include such provisions, applicable to the records of non-corporate as well as corporate business enterprises, are listed below:

Shipping Act, 1916 [46 U. S. C. §§ 826, 827, 814, 817, 820].

Packers and Stockyards Act, 1921 [7 U. S. C. §§ 221, 222].

Commodity Exchange Act of 1922 [7 U. S. C. §§ 15, 6, 7a].

Perishable Agricultural Commodities Act, 1930 [7 U. S. C. § 499m,
4901]

Communications Act of 1934 [47 U. S. C. §§ 409, 203, 211, 213 (f), 220, 412].

Securities Exchange Act of 1934 [15 U. S. C. §§ 78q, 78u].

Federal Alcohol Administration Act, 1935 [27 U. S. C. §§ 202 (c),

It is contended that a broader construction of the scope of the immunity provision than that approved by the Circuit Court of Appeals would be more consistent with the congressional aim, in conferring investigatory powers upon the Administrator, to secure prompt disclosure of books and records of the private enterprises subjected

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204 (d); 26 U.S.C. § 2857; 15 U.S.C. §§ 49, 50].
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Federal Power Act, 1935 [16 U.S.C. §§ 825 (a), 825f (g)].

Industrial Alcohol Act of 1935 [26 U. S. C. §§ 3119, 3121 (c)]. Motor Carrier Act of 1935 [49 U. S. C. §§ 305 (d), 304 (a) (1),

311 (d), 317, 318, 320, 322 (g)].

National Labor Relations Act, 1935 [29 U. S. C. §§ 156, 161].

Social Security Act, 1935 [42 U.S. C. § 405 (a), (d), (e), (f)].

Merchant Marine Act, 1936 [46 U. S. C. §§ 1124, 1211, 1114 (b)].

Bituminous Coal Act of 1937 [15 U. S. C. (1940 ed.) §§ 838, 833 (a) (e), (k), 840 (terminated, as provided in § 849)].

Civil Aeronautics Act of 1938 [49 U. S. C. §§ 644, 483, 487, 492, 622 (e) and (g), 673].

Fair Labor Standards Act of 1938 [29 U. S. C. §§ 209, 211; 15 U. S. C. §§ 49, 50].

Natural Gas Act, 1938 [15 U. S. C. § 717a, g, m].

Railroad Unemployment Insurance Act, 1938 [45 U. S. C. §§ 362 (a), (b), (c), (l), 359].

Water Carriers Act of 1940 [49 U. S. C. §§ 916, 906, 913, 917 (d)].

Freight Forwarders Act, 1942 [49 U. S. C. §§ 1017 (a), (b), (d), 1005, 1012, 1021 (d)].

In addition to the Price Control Act, the other major regulatory statutes enacted in response to the recent wartime exigencies also contain these provisions:

Second War Powers Act [50 U. S. C. App. (Supp. V, 1946) §§ 633, subsecs, 2 (a) (3), (4)].

Stabilization Act of 1942 [50 U. S. C. App. (Supp. V, 1945) - §§ 967 (b), 962].

War and Defense Contract Acts [50 U. S. C. App. (Supp. V, 1946) § 1152 (a) (3), (4)].

War Labor Disputes Act [50 U. S. C. App. (Supp. V, 1946) § 1507 (a) (3), (b)].

Very recent regulatory statutes, whose construction may also be affected or determined by the ruling of the Court in the present case, include:

to OPA regulations. In support of this contention, it is urged that the language and legislative history of the Act indicate nothing more than that \$ 202 was included for the purpose of "obtaining information" and that nothing in that history throws any light upon the scope of the immunity afforded by subsection (g). We cannot agree with these contentions. For, the language of the statute and its legislative history, viewed against the background of settled judicial construction of the immunity provision, indicate that Congress required records to be kept as a means of enforcing the statute and did not intend to frustrate the use of those records for enforcement action by granting an immunity bonus to individuals compelled to disclose their required records to the Administrator.

The very language of § 202 (a) discloses that the record-keeping and inspection requirements were designed not merely to "obtain information" for assistance in prescribing regulations or orders under the statute, but also to aid "in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder."

The legislative history of § 202 casts even stronger light on the meaning of the words used in that section. On July 30, 1941, the President of the United States, in a message to Congress, requested price-control legislation conferring effective authority to curb evasion and bootlegging.\* Two days later the Price Control Bill was intro-

Atomic Energy Act of 1946 [42 U. S. C. A. §§ 1812 (a) (3), 1810 (c) (Supp. 1947)].

Labor Management Relations Act of 1947 [Pub. L. No. 101, 80th Cong., 1st Sess., § 101, subsecs. 11, 6; § 207 (c) (June 23, 1947)].

<sup>\*</sup>Italics have been added here and in all other quotations in which they appear, unless otherwise noted.

scribed and operates through measures which are not appropriate or

duced in the House by Representative Steagall, and referred to the Committee on Banking and Currency.

As introduced, and as reported out of the Committee on November 7, 1941, the bill included broad investigatory, record-keeping, licensing, and other enforcement powers to be exercised by the Administrator.' While it was before the House, Representative Wolcott on Novem-

applicable in all circumstances. It has further been weakened by those who purport to recognise need for price stabilization yet challenge the existence of any effective power. In some cases, moreover, there has been evasion and bootlegging; in other cases the Office of Price Administration and Civilian Supply has been openly defied.

"Faced now with the prospect of inflationary price advances, legislative action can no longer prudently be postponed. Our national safety demands that we take steps at once to extend, clarify, and strengthen the authority of the Government to act in the interest of the general welfare." Doc. No. 332, 77th Cong., 1st Sess. 3 (1941).

<sup>7</sup> See 87 Cong. Rec. 9148 (1941) for the precise wording of § 202, which was then numbered § 211.

The full text of § 202 as enacted is as follows:

- "(a) The Administrator is authorised to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.
- "(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpens require any such person to appear and testify or to appear and produce documents, or both, at any designated place.
- "(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person

ber 28, 1941, offered as a substitute for § 201 a series of amendments, one of which authorized the Administrator "to subpoena documents and witnesses for the purpose of obtaining information in respect to the establishment

to appear and testify or to appear and produce documents, or both,

at any designated place.

"(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

"(e) In case of contumacy by, or refusal to obey a subpens served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

"(f) Witnesses subpensed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the

United States. -

"(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 1b, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

"(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the

national defense and security.

"(i) Any person subpensed under this section shall have the right to make a record of his testimony and to be represented by counsel." 56 Stat. 23, 30, as amended by § 105 of the Stabilization Extension Act of 1944, 58 Stat. 632, 637, 50 U.S. C., Supp. V, § 922.

of price ceilings, and a review of price ceilings." This amendment was adopted. Thereupon Representative Wolcott moved to strike out as "redundant" the much broader and far more rigorous provisions in the bill (§ 202), which authorized the Administrator to "require the making and keeping of records and other documents and making of reports," and to "obtain or require the furnishing of such information under oath or affirmation or otherwise, as he deems necessary or proper to assist him in prescribing any regulation or order under this act, and in the administration and enforcement of the act, and regulations and orders thereunder." This amendment too was accepted by the House.

It is significant to note that the Senate Committee on Banking and Currency began its consideration of the bill on December 9, 1941, the day after Congress declared the existence of a state of war between this country and the Imperial Government of Japan. Appearing before the Senate Committee in this wartime setting, the proponents of the original measure requested and secured the restoration of the enforcement powers which the House had stricken. They asserted that a major aspect of the investigatory powers contained in the bill as originally drafted was to enable the Administrator to ferret out violations and enforce the law against the

<sup>\* 87</sup> Cong. Rec. at 9232; see also id. at 9226.

º Id. at 9231.

<sup>10</sup> Id. at 9233.

As pointed out by the Senate Committee, "... in amending the House bill, the committee has sought to strengthen it. That bill, when we were not actually at war, might have sufficed. If the authority granted had proved inadequate, additional powers might have been sought and there might have been time to do so. But the swiftly moving pace of war, with evidences of inflation already apparent, leaves little time for the luxury of experiment. The need for price stability is urgent. "S. Rep. No. 931, 77th Cong., 2d Sess. 3 (Jan. 2, 1942).

violators. And it was pointed out that in striking down the authority originally given the Administrator in the committee bill to require the maintenance of records, the House had substantially stripped him of his investigatory and enforcement powers,

"because no investigatory power can be effective without the right to insist upon the maintenance of records. By the simple device of failing to keep records of pertinent transactions, or by destroying or falsifying such records, a person may violate the Act with impunity and little fear of detection. Especially is this true in the case of price-control legislation, which operates on many diverse industries and commodities, each industry having its own trade practices and methods of operation.

"The House bill also deprives the Administrator of the power to require reports and to make inspections and to copy documents: By this deprivation the Administrator's supervision over the operation of the act is rendered most difficult. He has no expeditious way of checking on compliance. He is left without ready power to discover violations.

"It should not be forgotten that the statute to be administered is an emergency statute. To put teeth into the Price Control Act, it is imperative that the Administrator's investigatory powers be strong, clear, and well adapted to the objective . . . ." 13

<sup>&</sup>lt;sup>12</sup> Hearings before the Senate Committee on Banking and Currency on H. R. 5998, 77th Cong., 1st Sess. 192 (1941) (the reference is contained in a brief filed with the Committee by the General Counsel of the Office of Price Administration).

<sup>13</sup> Id. at, 193.

It is apparently conceded that the written statement presented to the Schate Committee by the General Counsel of the OPA in its hearings sets forth the construction that this Court sustains in affirming the judgment of the Circuit Court of Appeals for the Second

Emphasis was placed on the restoration of licensing provisions, which the House had deleted from the Price Control Bill as originally drafted. The General Counsel for the OPA contended that licensing was the backbone of enforcement of price schedules and regulations." The World War I prototype of the Price Control Act, the Lever Act, had contained authority for the President to license the distribution of any necessaries whenever deemed essential "in order to carry into effect any of the purposes of this Act . . . ." 15 It was pointed out that "The general licensing regulations prescribed under the Lever Act, applicable to all licensees, required the making of reports (rule 1), the permitting of inspection (rule 2), and the keeping of records (rule 3)." 16 And it was noted that licensing had been employed in connection with the fuel provisions of the Act "as a method

Circuit in this case. We may accord to the construction expounded during the course of the hearings at least that weight which this Court has in the past given to the contemporaneous interpretation of an administrative agency affected by a statute, especially where it appears that the agency has actively sponsored the particular provisions which it interprets. And we may treat those contemporaneous expressions of opinion as "highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute. As such, they are entitled to serious consideration."

White v. Winchester Club, 315 U. S. 32, 41 (1942). See also United States v. American Trucking Assn., Inc., 310 U. S. 534, 549 (1940); Hassett-v. Welch, 303 U. S. 303, 310-311 (1938).

<sup>&</sup>lt;sup>14</sup> Hearings, supra note 12, at 181; see also id. at 154, 179-80 (oral testimony), 190-200; 88 Cong. Rec. 61, 693-94 (1942); S. Rep. No. 931, 77th Cong., 2d Sess. 8-9, 19 (1942).

<sup>&</sup>lt;sup>18</sup> Section 5, 40 Stat. 277 (1917). Although § 4 of the Lever Act, making it unlawful for any person to charge any "unjust or unreasonable rate or charge" for handling or dealing in necessaries, was held unconstitutional because of lack of an ascertainable standard of guilt in *United States* v. Cohen Grocery Co., 255 U. S. 81 (1921), the validity of the licensing and record-keeping provisions was not challenged.

<sup>16</sup> Hearings, supra note 12, at 183; see also id. at 154.

of obtaining information, of insuring universal compliance, and of enforcing refunds of overcharges and the payment of penalty charges to war charities." By licensing middlemen, "Violations were readily discovered by examination of the records which each licensee was required to submit." is

With this background, Congress restored licensing powers to the Administrator in the Price Control Bill as

17 Id. at 184.

The Report of the Senate Committee, following these hearings, recognized the key importance of licensing provisions for effective enforcement of the statute, noting that the "broad licensing power" which had been given to the Food Administrator under the Lever Act "was extensively and effectively used." The Report specifically referred also to the experience of the Fuel Administration, which at first lacked the power to license, then discovered the need for the power, and after acquiring it, secured "highly effective" enforcement results. The Report concluded that "... where there are many sellers, as in retailing for example, it is impossible to determine who is subject to control, much less enforce price regulations, without licensing. Of these facts industry is fully aware. Licensing provides a simple and direct control over violators. ... "S. Rep. No. 931, 77th Cong., 2d Sess. 8-9.

Speaking critically of the Conference Report, Representative Gifford, who was a Manager on the part of the House and had refused to sign the Report and the Statement by the Managers, described licensing then in practice in Canada as a parallel to the licensing proposed by the amended Bill. He called the attention of the House to the Canadian statement of policy: "These restrictions are not designed to curtail business operations in any way. But by placing every person who in any way handles the commodities named in the order under license, the Board will have the machinery with which. to make speedy checks on available stocks and to police more effectively any price-fixing order which may be instituted." 88 Cong. Rec. 672 (1942). (Rep. Gifford quoted the statement from "a compiled brief on the licensing methods;" it appears, together with other data referred tooby Rep. Gifford, in the section on licensing methods in the brief presented during the Senate hearings by the General Counsel of the OPA, cited supra note 12, at p. 188.)

18 Hearings, supra note 12, at 184,

on the next day, Senator Barkley, the Majority Leader and a member

enacted, § 205, 50 U.S.C.A. App. § 925 (f), and provided for the suspension by court action of the license of any person found to have violated any of the provisions of the license or price schedules or other requirements. Non-retail fruit dealers, including petitioner in the present case, were licensed under § 9a of Maximum Price Regulation No. 426, 8 F. R. 16411 (1943).

It is difficult to believe that Congress, whose attention was invited by the proponents of the Price Control Act to the vital importance of the licensing, record-keeping and inspection provisions in aiding effective enforcement of the Lever Act, could possibly have intended § 202 (g) to proffer a "gratuity to crime" by granting immunity to custodians of non-privileged records. Nor it is easy to conceive that Congress could have intended private privilege to attach to records whose keeping it authorized the Administrator to require on the express supposition that it was thereby inserting "teeth" into the Price Control Act since the Administrator, by the use of such records, could readily discover violations, check on compliance,

of the Committee, stated on the floor of the Senate on January 2, 1942, that these "hearings [held before the Senate Committee from December 9-17] have been in print for a week or two." 87 Cong. Rec. 10142. The Senate vote approving the House Bill as amended was not taken until January 10, more than two weeks after the hearings appeared in printed form. 88 Cong. Rec. 242. The House agreed to the Conference Report on January 26. Id. at 689. The Senate accepted the Conference Report on January 27. Id. at, 725. And the Bill was approved and signed by the President on January 30. Id. at 911.

It is also of some interest to note the statement, contained in the Senate Report on the Bill, that a subcommittee which had been appointed immediately after the conclusion of the December 9-17 hearings "extensively revised and strengthened the House bill in the light of the hearings and the onslaught of war." S. Rep. No. 931, 77th Cong., 2d Sess. 6 (Jan. 2, 1942). We assume that this record of the Senate Committee proceedings merits the same presumption of regularity as the record of a county criminal court. Cf. Foster, v. Illinois, 332 U.S. 134, 138 (1947).

and prevent violations from being committed "with impunity."

In conformance with these views, the bill as passed by Congress empowered the Administrator to require the making and keeping of records by all persons subject to the statute; and to compel, by legal process, oral testimony of witnesses and the production of documents deemed necessary in the administration and enforcement of the statute and regulations. It also included the immunity proviso, subsection (g) of § 202, as to which no special attention seems to have been paid in the debates, although it was undoubtedly included, as it had been in other statutes, as a "usual administrative provision," intended to fulfill the purpose customarily fulfilled by such a provision.

The inescapable implications of the legislative history related above concerning the other subsections of § 202 would appear to be that Congress did not intend the scope of the statutory immunity to be so broad as to confer a bonus for the production of information otherwise obtainable.

Moreover, there is a presumption that Congress, in reenacting the immunity provision of the 1893 Act, was aware of the settled judicial construction of the statutory immunity. In adopting the language used in the earlier act, Congress, "must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." That judicial construction is made up of the doctrines enunciated by this Court in spelling out the non-privileged status of records validly required by law to be kept, in Wilson v. United States, 221 U. S. 361 (1911), and the inapplicability of

<sup>&</sup>lt;sup>20</sup> See Joint Hearings on S. 2475 and H. R. 7200 (Fair Labor Standards Act), 75th Cong., 1st Sess. 61 (1937).

<sup>&</sup>lt;sup>21</sup> Hecht v. Malley, 265 U. S. 144, 153 (1924); see also Missouri v. Ross, 299 U. S. 72, 75 (1936); Sessions v. Romadka, 145 U. S. 29, 42 (1892).

immunity provisions to non-privileged documents, in Heike v. United States, 227 U.S. 131 (1914).

In the former case, Wilson, the president of a corporation, was required by subpoena to produce the corporate books in his custody before a grand jury. He appeared before the grand jury but refused to deliver up the records on the ground that their contents would tend to incriminate him, and claimed privilege under the Fifth Amendment. On review in this Court of the judgment committing him for contempt, Wilson based his defense in part on the theory that he would have been protected in his constitutional privilege against self-incrimination had be been sworn as a witness, and that the government's failure to permit him to be sworn could not deprive him of such protection.22 This argument was disposed of by the Court simply on the ground that a corporate" officer has no such constitutional privilege as to corporate records in his possession, even though they contain entries made by himself which disclose his crime. Mr. Justice Hughes, announcing the opinion of the Court, based the decision on the reasoning (which this Court recently cited with approval, in Davis v. United States, 328 U. S. 582, 589-90 [1946]), that

"the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. . . The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that

<sup>&</sup>lt;sup>22</sup> See digest of brief for appellant in Wilson v. United States, 55 L. Ed. 771, 773 (1911).

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there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."

As illustrations of documents meeting this "required records" test, the Court cited with approval state supreme court decisions that business records kept under requirement of law by private individuals in unincorporated enterprises were "public documents which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection." "The non-corporate records treated as

Wilson v. United States, 221 U. S. 361, 380 (1911). Holmes, J., in Heike v. United States, 227 U. S. 131, 143 (1913), emphasized that the decision in Wilson went "upon the absence of constitutional privilege, not upon the ground of statutory immunity in such a case."

<sup>\*</sup>Wilson, supra note 23, at 381. In a later decision involving the alleged bility of corporate officers to assert constitutional privilege in relation to records required to be kept under a regulatory statute, Hughes, J., speaking for the Court, further spelled out the implications of the Wilson case and of the "required records" doctrine:

<sup>&</sup>quot;... the transactions to which the required reports relate are corporate transactions subject to the regulating power of Congress. And, with regard to the keeping of suitable records of corporate administration, and the making of reports of corporate action, where these are ordered by the Commission under the authority of Congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation, and cannot claim a personal privilege in hostility to the requirement." Baltimore & O. R. Co. v. L. C. C., 221 U. S. 612, 622-23 (1911).

Thus the significant element in determining the absence of constitutional privilege was the fact that the records in question had been validly required to be kept to enable the Commission "properly to perform its duty to enforce the law." Id. at 622. The fact that the individuals claiming the privilege were corporate officers was significant only in that the business transactions subject to the Interstate Commerce Act and the records required to be kept were corporate. And, as corporate officers, they were bound by the obligation imposed

public in those cases concerned such individuals as druggists required by statute to keep a record of all sales of intoxicating liquors. The corporate and non-corporate businesses required by the Price Control Act to keep records embrace a much greater number of enterprises than those similarly regulated by the states and municipalities. But, since it is conceded that the increased scope of regulation under the wartime measure here involved does not render that Act unconstitutional, the required records doctrine which this Court approved as applied to non-corporate businessmen in the state cases would appear equally applicable in the case at bar.

In the Heike case, this Court, per Holmes, J., laid down a standard for the construction of statutory immunity provisos which clearly requires affirmance of the decision of the circuit court here: "... the obvious pur-

by the statute upon their corporation to keep the record. In other words, they were deemed custodians of the records for the Interstate Commerce Commission, not merely for the corporation. Had the transactions there regulated, and the records there required, concerned an unincorporated business, Justice Hughes' rationale sustaining the absence of constitutional privilege against self-incrimination would still apply with undiminished force.

This decision was cited with approval in *United States* v. *Darby*, 312 U. S. 100, 125 (1941), in support of the Court's holding that it is constitutional for Congress, as a means of enforcing the valid regulations imposed by the Fair Labor Standards Act, to require an employer to keep records of wages and hours of his employees. See note 42 infra.

Other state supreme court decisions, subsequent to the Wilson case, similarly treat as non-privileged, records required by statute to be kept by such individuals as licensed fish dealers, Paladini v. Superior Court, 178 Cal. 369, 372-74, 173 Pac. 588, 590 (1918); junk dealers regulated by municipal ordinance, St. Louis v. Baskovitz, 273 Mo. 543; 201 S. W. 870 (1918), or by statute, State v. Legora, 162 Tenn. 122, 127-28, 34 S. W. 2d 1056, 1057-58 (1931), cf. Rosenthal v. New York, 226 U. S. 260, 268-69 (1912); dealers in raw furs, State v. Stein, 215 Minn. 308, 9 N. W. 2d 769 (1943); and licensed money lenders, Financial Aid Corp. v. Wallace, 23 N. E. 2d 472, 474, 476 (Ind., 1939).

pose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have Been the privilege of the person concerned." se In yiew of the clear rationale in Wilson, taken together with the ruling in Heike as to how statutory immunity provisos should be construed, the conclusion seems in ditable that Congress must have intended the immundy proviso in the Price Control Act to be coterminous with what would otherwise have been the constitutional privilege of petitioner in the case at bar. Since he could assert no valid privilege as to the required records here in question, he was entitled to no immunity under the statute thus viewed.

The traditional rule that re-enactment of a statute creates a presumption of legislative adoption of previous judicial construction may properly be applied here, since the Court in *Heike* regarded the 1903 immunity statute there construed as identical, in policy and in the scope of immunity furnished, with the Compulsory Testimony Act of 1893, which has been reenacted by incorporation into the Price Control Act.

In addition, scrutiny of the precise wording of § 202 (g) of the latter statute indicates that the draftsmen of that section went to some pains to ensure that the immunity provided for would be construed by the courts as being so limited. The construction adopted in the Heike decision was rendered somewhat difficult because neither the Compulsory Testimony Act of 1893 nor the immunity proviso in the 1903 Act made any explicit reference to the constitutional privilege against self-incrimination, with whose scope the Court nonetheless held the immunity to be coterminous. Section 202 (g), on the

<sup>26</sup> Heike, supra note 23, at 142.

other hand, follows a pattern set by the Securities Act of 1933 and expressly refers to that privilege, thus apparently seeking to make it doubly certain that the courts would construe the immunity there granted as no broader than the privilege:

"No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity previsions of the Compulsory Testimony Act of Feb. 11, 1893... shall apply with sespect to any individual who specifically claims such privilege."

A comparison of the precise wording of § 202 (g) with the wording of immunity provisions contained in earlier statutes readily suggests one function intended by the drafters of § 202 (g) to be performed by the additional

<sup>27</sup> See analysis of the earlier provisos in 8 Wigmore, Evidence, £11 n.9 (3d ed. 1940), and in the brief submitted by the Government in Heike, a digest of which appears at 227 U. S. 137. Whether the stronger wording in the Price Control Act and other recent enactments be deemed to indicate a "new legislative purpose," as the majority of the Court in United States v. Monia, 317 U. S. 424 (1943), ruled that it did in connection with a procedural point not involved in the present case—or be deemed nothing more than "a careful rephrasing of a conventional statutory provision," as the dissenters in Monia, supra at 446, believed, the more stringent phrasing of the Price Control Act. proviso must, in either view, be regarded as strengthening the applicability of the rule of construction of the Heike case:

The precise holding in Monia was that a witness before an investigatory body need not claim his privilege as a prerequisite to earning immunity under a pre-1933 statute which offered immunity without any reference to the need for making such a claim. The majority considered the Heike decision inapplicable to Monia because the relevant terms of the immunity proviso involved in the latter case were so plain and so sharply in contrast with the wording of the enactments after 1933, which (including the Price Control Act) expressly require the assertion of the claim, that Congress could not have intended the pre-1933 statute to require a witness to assert his claim. And it was emphasized that, to construe congressional intention otherwise in those circumstances, might well result in entrap-

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phrases expressly referring to "privilege"-viz., that of underlining the legislative intention of requiring an exchange of constitutional privilege for immunity, an intent which the Court had previously thought discernable even in the less obvious terms used by the drafters of the earlier statutes. Thus the immunity provisions of the Compulsory Testimeny Act can be relied upon here only if the two prerequisites set forth in § 202 (g) are satisfied:
(1) that the person seeking to avail himself of the immunity could actually have been excused, in the absence of this section, from complying with any of its requirements because of his constitutional privilege against selfincrimination, and (2) that the person specifically claim such privilege. Obviously if prerequisite (1) is not fulfilled, the mere fact that the person specifically claims a non-existent privilege was not intended by Congress to entitle him to the benefit of the immunity. And this is so whether the statute be construed with particular reference to its grammar, its historical genesis, or its rational function.

Petitioner does not deny that the actual existence of a genuine privilege against self-incrimination is an absolute prerequisite for the attainment of immunity under § 202 (g) by a corporate officer who has been compelled by subpoena to produce required records; and that, under the *Heike* ruling, the assertion of a claim to such a privilege in connection with records which are in fact non-privileged is unavailing to secure immunity, where the claimant is a corporate officer. But, while conceding that the statute should be so construed where corporate officials are concerned, the petitioner necessarily attributes to Congress the paradoxical intention of awarding immunity in exchange for a claim of privilege as to records of a

ment of witnesses as to testimony concededly privileged. We do not perceive such distinguishing factors in the case at bar, and accordingly consider the *Heike* rationale fully applicable here.

claimant engaged in non-corporate business, though his business is similarly subjected to governmental price control, and its required records are, under the Wilson rationale, similarly non-privileged.

The implausibility of any such interpretation of congressional intent is highlighted by the unquestioned fact that Congress provided for price regulations enforcible against unincorporated entrepreneurs as well as corporate industry. It is also unquestionable that Congress, to ensure that violations of the statute should not go unpunished, required records to be kept of all relevant buying and selling transactions by all individual and corporate business subject to the statute. If these aspects of congressional intention be conceded, it is most difficult to comprehend why Congress should be assumed to have differentiated sub stlentio, for purposes of the immunity proviso, between records required to be kept by individuals and records required to be kept by corporations. Such an assumption carries with it the incongruous result that individuals forced to produce records required to be kept for the Administrator's inspection and use in enforcing the price regulations, would be given a bonus of immunity if engaged in non-corporate business, thus rendering the records of non-corporate enterprise virtually useless for enforcement purposes," whereas individuals disclosing the very same type of required records but engaged in corporate enterprise, would not be given that In effect, this is to say that Congress intended

See Judge Delehant's well-reasoned discussion, in Boules v. Misle, 64 F. Supp. 835, 843 (1946), of the "public or semi-public" character of records kept by a non-corporate entrepreneur subject in his business to such governmental regulation: "... if the regulating authority may be intercepted altogether at the door of a regulated business in its quest of information fouching the observance of the law and applicable regulations, its ministry must be fruitless. And it can be no more effective if, realistically viewed, the administrator's examination may be made only at a bargain which absolves the proprietor of the business from the sanctions, whether civil or criminal, by law

the immunity proviso to frustrate a major aim of its statutory requirement of record-keeping and record inspection so far as it applies to non-corporate business men, but not so far as it applies to corporate officers."

It is contended that to construe the immunity proviso as we have here is to devitalize, if not render meaningless, the phrase "any requirements" which appears in the

provided for such violations of the regulations, and, therefore, of the law as examination may disclose.

Compare the dictum in United States v. Mulligan, 268 F. 893 (N. D. N. Y. 1920), that records required to be kept by an unincorporated businessman under the Lever Act were not privileged, and that information contained therein was available for use in criminal prosecutions against the record-keeper himself. Like the Price Control Act, the Lever Act contained a compulsory testimony immunity provision. § 25, 40 Stat. 285. The memorandum filed with the Senate Committee, cited supra note 12, at. 194, specifically referred to the "well-stated" opinion in the Mulligan case.

. The extreme unlikelihood that such a distinction, not expressly stated anywhere in the Act, was nevertheless intended by Congress becomes even more apparent in the light of express provision in the statute, §4 (a), making it unlawful for any person subject to the Act, whether in corporate or unincorporated business enterprise, to fail to comply with the record-keeping requirements of § 202 (b), and making it unlawful, \$ 205 (b), for any such person to make "any statement or entry false in any material respect in any document or report required to be kept or filed" under § 202 (b). Even in the absence of the judicial background highlighted by the rationale: of the Wilson and Heike decisions, it would be difficult to imagine . that records properly required to be kept by the government, for government use in the administration of a regulatory statute, with penalties of fines and imprisonment applicable against any person subject to the statute who fails to keep those records or who falsifies entries in them, could still be regarded by Congress or the public as private records concerning which the recorder may assert a privilege. against self-incrimination.

The phrase "any requirements" appears also in the immunity provision of the Atomic Energy Act of 1946, 42 U.S. C. A. § 1812 (a) (3) (Supp. 1947). There, as in the Price Control Act, some of the requirements referred to would, in the absence of the section, be excusable because of privilege—e. g., compelled oral testimony—while

opening clause of § 202 (g): "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination ........." It is urged that, since § 202 includes among its requirements the furnishing of information under oath, the making and keeping of records and reports, the inspection and copying of records and other documents, and the appearing and testifying or producing of documents, the immunity provided must cover compliance with any one of these requirements. The short answer to that contention is that the immunity provided does cover compliance with any of these requirements as to which a person would have been excused from compliance because of his privilege, were it not for the statutory grant of immunity in exchange for such privilege.31 The express language of the proviso, as well as its historical background, readily suggests this reasonable interpretation. Even those who oppose this interpretation must and do concede that Congress had no intention of removing the excuse of privilege where the privilege is absent from the outset because the records whose production is ordered and concerning which privilege is asserted are corporate records.

other requirements, including the compulsory production of records which had been kept pursuant to the statute (§ 1810 [c]), would under the Wilson doctrine, have the same non-privileged (and hence non-immunizing) status as the sales record involved in the present case. Compare also the phraseology used in such statutes as the War and Defense Contract Acts, 50 U.S. C. App. (Supp. V, 1946) § 1152 (a) (3), (4), and Freight Forwarders Act (1942), 49 U.S. C. § 1017 (a), (b), (d).

Compare the paraphrase of § 202 (g) contained in the Committee Reports: "... Although no person is excused from complying with any requirement of this subsection because of his privilege against self-incrimination, the immunity provisions of the Compulsory Testimony Act of February 11, 1893, are made applicable with respect to any individual who specifically claims such privilege." S. Rep. No. 931, 77th Cong., 2d Sess. 21; H. R. Rep. No. 1409, 77th Cong., 1st Sess. 9. (Italics added here, as elsewhere unless otherwise noted.)

concession is made, surely logic as well as history requires a similar reading of the proviso in connection with validly required non-corporate records, as to which privilege is similarly absent from the outset.

If the contention advanced against our interpretation be valid, the Court must have erred in its construction of the immunity proviso in the Heike case. For, the 1893 Act, 49 U.S.C. A. § 46, which it was in effect construing, provides that, "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission . . . for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted . . . for or on account of any transaction . . . concerning which he may testify, or produce evidence, documentary or otherwise . . . . " Thus the immunity part of the 1893 statute extended to any documentary as well as oral testimony concerning which there might be a claim of privilege. And included among the documents which the immunity-seeker might be compelled to produce were records maintained by common carriers in compliance with the requirements of the Interstate Commerce Act. 22 and hence obviously within the definition of public records set forth in the Wilson and Heike decisions. If the reasoning advanced against the interpretation of § 202 (g) we have proposed were valid. then it might equally well be contended that the Court in the Heike decision devitalized, if not rendered meaningless, the phrase, "documentary or otherwise" in the immunity section of the 1893 Act.

<sup>&</sup>lt;sup>32</sup> Section 6 of the Interstate Commerce Act of Feb. 4, 1887, c. 104, 24 Stat. 380, required every common carrier subject to the provisions of the statute to file with the Commission copies of its sehedules and tariffs of rates, fares, and charges, and of all contracts and agreements between carriers.

Actually, neither the interpretation as applied in the Heike decision nor as expounded here renders meaningless any of the words in the immunity provision. In each case, the immunity proviso is set forth in conjunction with record-keeping requirements. And in each case, where the immunity provided concerns documents whose production might otherwise be excused on the ground of privilege, the documents referred to are all writings whose keeping as records has not been required by valid statute or regulation. Of course all oral testimony by individuals can properly be compelled only by exchange of immunity in return for privilege. 33

This is substantially the same sort of confidential treatment provided for by the Hepburn Act of 1906, 34 Stat. 594, amending the Interstate Commerce Act: "Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction,

obtained by the Administrator is inconsistent with the views of this opinion. We find no such inconsistency in the presence of §§ 4 (c) and 202 (h), the provisions which specify the types of confidential safeguards intended.

<sup>&</sup>quot;Section 4 (c) affords protection to those persons required to disclose information to the Administrator by making it unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose or to use for his personal benefit, any information obtained under the bill. Further provision for confidential treatment of such information is found in section 202 (b) [changed in Conference to § 202 (h)]. . . Section 202 (b) gives further protection to persons furnishing information to the Administrator under the bill by directing the Administrator upon the request of the party furnishing such information, or if he deems such information confidential, not to disclose such information unless he deems that the public interest requires such disclosure." S. Rep. No. 931, 77th Cong., 2d Sess. 20-21.

The Court in the Heike case was confronted with the further contentior that the 1903 immunity statute. which was immediately before him, had been passed when "there was an imperious popular demand that the inside working of the trusts should be investigated, and that the people and Congress cared so much to secure the necessary evidence that they were willing that some guilty persons should escape, as that reward was necessary to the end." 34 In the light of the express statements in the legislative history of the Price Control Act as to the enforcement role of the investigatory powers, such an argument would hardly be tenable in the present ease. Yet even in the Heike case where such an argument had some elements of plausibility, the Court had no difficulty in rejecting it in favor of the Government's contention that "the statute should be limited as nearly as may be by the boundaries of the constitutional privilege of which it takes the place." as

to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both." 49 U. S. C. § 20 (3). Numerous other statutes have incorporated almost identically worded provisions. See e. g., Motor Carrier Act of 1935, 49 U. S. C. § 322 (d).

In statutes such as these, where Congress validly distinguishes required records from private papers, with respect to the availability of the required documents as evidence in criminal or other proceedings to enforce the statute for whose effectuation they are kept, nothing in logic nor historical practice requires Congress at the same time to treat the records as public in the sense that they be open at all times to scrutiny by the merely curious. See Coleman v. United States, 153 F. 2d 400, 402-04 (C. C. A. 6, 1946). Congress expressly foreclosed such a result in the Emergency Price Control Act, and this opinion neither requires nor permits it.

<sup>34</sup> Heike, supra note 23, at 141.

<sup>&</sup>lt;sup>35</sup> Id. at 141-42. It would appear that the persuasive brief for the Government in this case, prepared with the assistance of eminent counsel, called forth a Holmesian echo.

As a final answer, an understanding of the 1893 immunity provision, based on its full historical context, should suffice to explain the limited function contemplated by Congress in incorporating that provision into the 1942 statute. The 1893 provision was enacted merely to provide an immunity sufficiently broad to be an adequate substitute for the constitutional privilege, since previous statutory provision for immunity had been found by the Court in Counselman v. Hitchcock, 142 U. S. 547 (1892), not to be coextensive with the privilege, thus rendering unconstitutional the statutory requirements for compulsory production of privileged documents and oral testimony.<sup>34</sup>

The suggestion has been advanced that the scope of the immunity intended by Congress should be ascertained, not by reference to the judicial and legislative history considered above, but by reference to the principle expounded in Federal Trade Comm'n v. American Tobacco Co., 264 U.S. 298, 307 (1924), of construing a broad grant of statutory authority so as to avoid attributing to Congress "an intent to defy the Pourth Amendment or even to come so near to doing so us to raise a serious question of constitutional law."

It is interesting to note that Congress, in enacting the Price Control Bill, apparently did intend to rely upon the principle of *American Tobacco* in circumstances similar to those in which that principle was originally

<sup>&</sup>lt;sup>36</sup> See Heike, supra note 23, at 142; Brown v. Walker, 161 U. S. 591, 594-5 (1896); Hale v. Henkel, 201 U. S. 43, 67 (1906). Salso the statement made in the House by Representative Wise, of the Committee on Interstate and Foreign Commerce, in presenting the bill which became the basis of the 1893 Compulsory Testimony Act: "The whole scope and effect of the act is simply to meet the decision rendered recently by the Supreme Court in the case known as 'the Councilman [sic] case.'" 24 Cong. Rec. 503 (1893).

applied: namely, to insure that the power of inspection or examination would not conflict with the prohibition against unreasonable searches and seizures contained in the Fourth Amendment. Senator Brown, who was chairman of the sub-committee on the Price Control Bill and one of the managers on the part of the Senate appointed to confer with the House managers on the Senate amendments, expressly stated it to be the view of the conferees that \$ 202 (a), which contained broadauthorization to the Administrator to "obtain such information as he deems necessary or proper to assist him" in his statutory duties, was intended solely to empower the Administrator to "obtain relevant data to enable him properly to discharge his functions, preferably by requiring the furnishing of information under oath or affirmation or otherwise as he may determine. It is not intended, nor is any other provision of the Act intended, to confer any power of inspection or examination which might conflict with the Fourth Amendment of the Constitution of the United States. See opinion of Justice Holmes in Federal Trade Comm'n v. American Tobacco Co., 264 U.S. 298, 307." \*\*

It was the abuse of the subpoena power to obtain irrelevant data in the course of a "fishing expedition" with which the Court was concerned in that case. It is clear that if the Administrator sought to obtain data irrelevant to the effective administration of the statute and if his right of access was challenged on the ground that the evidence sought was "plainly incompetent or irrelevant to any lawful purpose of the Administrator," that objection could sustain a refusal by the district court to issue a subpoena or other writ to compel inspection. But

<sup>57 88</sup> Cong. Rec. 700 (1942).

<sup>\*\*</sup> Endicott Johnson Corp. v. Perkins, 317.U. S. 501, 509 (1943).

there is no indication in the legislative history that Congress intended the American Tobacco principle of construction to govern the immunity provise of subsection (g), particularly since the scope of that provise had been so well demarcated by the courts prior to its 1942 re-enactment. And it is not insignificant that the one rule of construction which this Court has, in the past, directly and expressly applied to the immunity provise—that "It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned" —was enunciated by Mr. Justice Holmes, who gave no sign of repudiating that principle by his subsequent statements in the American Tobacco case.

Even if the exidence of congressional intent contained in the legislative history were less clear-cut and persuasive, and constitutional doubts more serious than they appear to us, we would still be unconvinced as to the applicability of the American Tobacco standard to the construction of the immunity proviso in relation to documentary evidence which is clearly and undeniably relevant, and the recording and keeping of which the Administrator has properly required in advance. in construing statutory immunities in such circumstances. we must heed the equally well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen. The canon of avoidance of constitutional doubts must, like the "plain meaning" rule, give way where its application would produce a futile result, or an unreasonable result "plainly at

<sup>\*</sup> Heike, supra note 23, at 142.

In the present case, not merely does the construction put forward by the petitioner frustrate the congressional intent as manifested by the legislative history, but it also shuts out the illumination that emanates from key words and phrases in the section when considered, as above, in the context of the history of the Compulsory Testimony Act of 1893, and the construction that had been placed upon it and similar provisos, prior to its incorporation into the Price Control Act.

There remains for consideration only the question as to whether serious doubts of constitutionality are raised if the Price Control Act is thus construed. This issue was not duly raised by petitioner, and it becomes relevant, if at all, only because such doubts are now said to be present if the immunity proviso is interpreted as set forth above.

It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity

<sup>&</sup>lt;sup>40</sup> United States v. American Trucking Assns., Inc., 310 U. S. 534, 543 (1940); see also Missouri, Mississippi R. Co. v. Boone, 279 U. S. 466, 472 (1926).

<sup>&</sup>quot;A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court-to face a constitutional question." United States v. Sullivan, 332 U.S. 689, 693 (1948).

concerned, and can constitutionally require the Keeping of particular records, subject to inspection by the Administrator. It is not questioned here that Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the licensing and record-keeping requirements of the Price Control Act represent a legitimate exercise of that power. Accordingly, the principle enunciated in the Wilson case, and reaffirmed as recently as the Davis case, is clearly applicable here: namely, that the privilege which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established."

<sup>&</sup>quot; Cf. Yakus v. United States, 321 U. S. 414, 422 (1944).

Davis v. United States, 328 U. S. 582, 589-90 (1946). See also United States v. Darby, 312 U. S. 100, 125 (1941) ("Since . . . Congress may require production for interstate commerce to conform to those conditions [wages and hours], it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to a legitimate end. . . ."); Arrow Distilleries v. Alexander, 109 F. 2d 397, 404-05 (1940); Di Santo v. United States, 93 F. 2d 948 (1937). Cf. Rodgers v. United States, 138 F. 2d 992, 995-96 (1943).

In Boyd v. United St. 'es, 116 U. S. 616 (1886), the Court held unconstitutional, as reputant to the Fourth and Fifth Amendments, an 1874 revenue statute which required the defendant or claimant, on motion of the Government attorney, to produce in court his private books, invoices and papers, or else the allegations of the Government were to be taken as confessed. The document to which the statute had been applied in that case was an invoice, which the Government, as well as the defendant, treated throughout the trial and appellate proceedings as a private business record. The Government defended the constitutionality of the statute thus applied on the ground that the action was not against the claimants, but was merely a civil action in rem for the forfeiture of merchandise, in which action the claimants had voluntarily intervened. It argued that in a forfeiture action, private books and papers produced under

Even the dissenting Justices in the Davis case conceded that "there is an important difference in the constitutional protection afforded their possessors between papers exclusively private and documents having public aspects," a difference whose essence is that the latter papers, "once they have been legally obtained, are available as evi-

compulsion have no higher sanctity than other property, since the provision in the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" applies only to criminal proceedings in personam.

In rejecting the Government's contention, the opinion of the majority of the Court proceeded mainly upon a complex interpretation of the Fourth Amendment, taken as intertwined in its purpose and historical origins with the Fifth Amendment. Under that view, "a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit fi. e., a suit for a penalty or forfeiture] is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." Id. at 634-35; see also id. at 621 et seq. In other words, the majority opinion construed the prohibition of the Fourth Amendment as applying in the foregoing circumstances "to a returnable writ of seizure describing specific documents in the possession of a specific person." 8 Wigmore, Evidence 368 (3d ed. 1940); see Hale v. Henkel, 201 U.S. 43, 71-72 (1906).

Holding this view of the Fourth Amendment, the majority of the Court nevertheless carefully distinguished the "unreasonable search and seizure" effected by the statute before it from the "search and seizure" which Congress had provided for in revenue acts that required manufacturers to keep certain records, subject to inspection (see, e. g., Act of July 20, 1868, c. 186, §§ 19, 45, 15 Stat. 133, 143, regulating distillers and rectifiers): "... the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. "Ind. at 623-24.

<sup>43</sup> Davis, supra note 42, at 602.

dence." "In the case at bar, it cannot be doubted that the sales record which petitioner was required to keep as a licensee under the Price Control Act has "public aspects." Nor can there be any doubt that when it was obtained by the Administrator through the use of a subpoena, as authorized specifically by § 202 (b) of the statute, it was "legally obtained" and hence "available as evidence." The record involved in the case at bar was a sales record required to be maintained under an appropriate regulation, its relevance to the lawful purpose of the Administrator is unquestioned, and the transaction which it recorded was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute."

<sup>4</sup> Ibid

<sup>45</sup> See dissenting opinion in Davis, supra note 42, at 614 p.9. See also Amato v. Porter, 157 F. 2d 719 (1946); Coleman v. United States, 153 F. 2d 400 (1946).

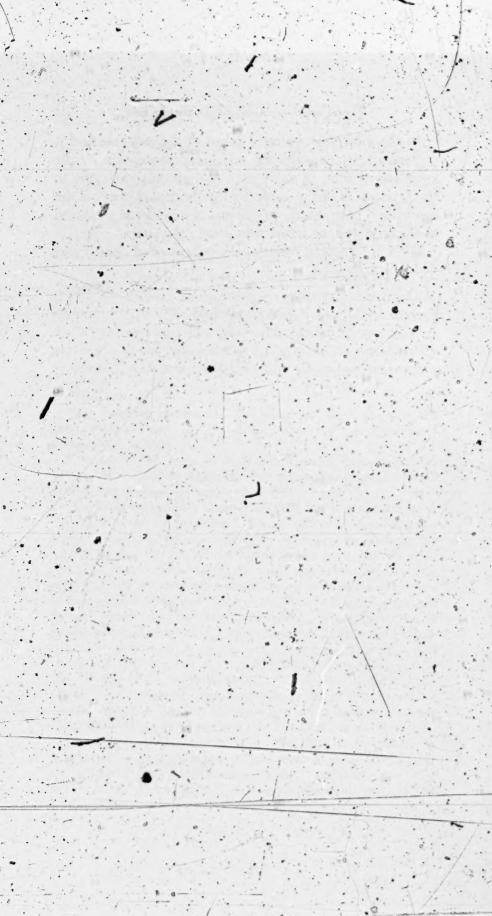
See also the rationale set forth in 8 Wigmore, Evidence § 2259c (3d ed. 1940), a section which was cited with approval by the opinion of the Court in Davis, supra note 42, at 590:

<sup>&</sup>quot;The State requires the books to be kept, but it does not require the officer to commit the crime. If in the course of committing the crime the makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law. The State announced its requirement to keep the books long before there was any crime; so that the entry was made by reason of a command or compulsion which was directed to the class of entries in general, and not to this specific act. The duty or compulsion to disclose the books existed generically, and prior to the specific act; hence the compulsion is not directed to the criminal act, but is independent of it, and cannot be attributed to it. . . . The same reasoning applies to records required by law to be kept by a citizen not being a public official, e. g., a druggist's report solicuor sales, or a pawnbroker's record of pledges. The only different here is that the duty arises not from the person's general official status, but from the specific statute limited to a particular class of acts. The duty, or compulsion, is directed as before, to the generic class of acts, not to the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty." (Italics as in the original.)

In the view that we have taken of the case, we find it unnecessary to consider the additional contention by the government that, in any event, no immunity attaches to the production of the books by the petitioner because the connection between the books and the evidence produced at the trial was too tenuous to justify the claim.

For the foregoing reasons, the judgment of the Circuit Court of Appeals is

Affirmed.



## SUPREME COURT OF THE UNITED STATES

No. 49.—OCTOBER TERM, 1947.

William Shapiro, Petitioner,

The United States.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 21, 1948.]

MR. JUSTICE FRANKFURTER, dissenting.

The Court this day decides that when Congress preseribes for a limited Governmental purpose, enforceable by appropriate sanctions, the form in which some records are to be kept, not by corporations but by private individuals, in what in everyday language is a private and not a Governmental business, Congress thereby takes such records out of the protection of the Constitution against self-incrimination and search and seizure. Decision of constitutional issues is at times unavoidable. But in this case the Court so decides when it is not necessary. The Court makes a drastic break with the past in disregard of the settled principle of constitutional adjudication not to pass on a constitutional issue-and here a grave one involving basic civil liberties-if a construction that does no violence to the English language permits its avoidance. This statute clearly permits it.1 Instead, the Court goes on the assumption that an immunity statute must be equated with the privilege, although only recently the Court attributed to Congress a gratuitous grant of immunity where concededly the

<sup>&</sup>quot;A decision could be made either way without contradicting the express words of the act, or, possibly, even any very clear implication." Holmes, C. J., in *Hooper v. Bradford*, 178 Mass. 95, 97.

Constitution did not require it, under circumstances far less persuasive than the statutory language and the policy underlying it. See *United States* v. *Monia*, 317 U. S. 424.

Instead of respecting "serious doubts of constitutionality" by giving what is at the least an allowable construction to the Price Control Act which legitimately avoids these doubts, the Court goes out of its way to make a farreaching pronouncement on a provision of the Bill of Rights. In an almost cursory fashion, the Court needlessly decides that all records which Congress may require individuals to keep in the confluct of their affairs, because they fall within some regulatory power of Government, become "public records" and thereby, ipso facto, fall outside the protection of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself."

In reaching out for a constitutional adjudication, especially one of such moment, when a statutory solution avoiding it lay ready at hand, the Court has disregarded its constantly professed principle for the proper approach toward congressional legislation. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal-principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U. S. 22, 62, quoted by Mr. Justice Brandeis with supporting citations in Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 348, n. 8. And see, generally, for duty to avoid constitutional adjudication, Rescue Army v. Municipal Court, 331 U. S. 549, 568 et seq.

Departure from a basic canon of constitutional adjudication is singularly uncalled for in a case such as this, where the statute not only permits a construction avoiding constitutional considerations but on fair reading requires it.

In conferring powers of investigation upon the Administrator, Congress designed to secure the promptest disclosure of the books and records of the millions of private enterprises subjected to the regulations of the Office of Price Administration. It would contradict that vital aim to attribute to Congress the conflicting purpose of hampering the free flow of knowledge contained in businessmen's books by inviting controversies regarding still undetermined claims of privilege under the Fifth Amendment, in the absence of an expression of such purpose made much more manifest than the broad language of § 202 (g) which conferred immunity for the very purpose of avoiding such controversies.

It is a poor answer to say that if the statute were eventually found to confer immunity only to the extent. required for supplying an equivalent for the constitutional privilege, all records would turn out to be unprivileged or would furnish immunity, and in either case refute any excuse for withholding them. Business men are not guided by such abstractions. Obedience is not freely given to uncertain laws when they involve such sensitive matters as opening the books of business. And so, business men would have had a strong incentive to hold back their records, forcing the Administrator to compel production by judicial process. Apart from the use of opportunities for obstructive tactics that can hardly be circumvented when new legislation is tested, delays inevitable to litigation would dam up the flow of needed information. Congress sought to produce information, not litigation. See United States v. Monia, supra, at p. 428.

In the Monia case the Court considered that the statute, "if interpreted as the Government now desires, may well be a trap for the witness." Id. at 430. We need not speculate here as to potential entrapment. The record

discloses that the petitioner asked, through his attorney, whether he was "being granted immunity as to any and all matters for information obtained as the result of the investigation and examination of these records." On behalf of the Price Administrator, the reply was "The witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to MPRs [Maximum Price Regulations] 271 and 426." Petitioner, himself, thereupon specifically claimed immunity underthe statute as well as under the Constitution, and stated that under "these conditions" he produced the books and records that the subpoena sought. It seems clear that disclosure was here made, records were produced, on the petitioner's justifiable belief-based upon the advice of counsel and acquiesced in by the presiding official-that he thereby secured statutory immunity and not constitutional litigation.

There is nothing to indicate that in 1942 Congress legislated with a view to litigating the scope of the limitation of the Fifth Amendment upon its powers. To ascertain what Congress meant by § 202 (g) we would do well to begin by carefully attending to what Congress said:

"No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, (U. S. C. 1934 ed. Title 49 Sec. 46), shall apply with respect to any individual who specifically claims such privilege." 56 Stat. 23, 30, 50 U. S. C. Supp. V, § 922.

The text must be put into its context, not merely because one provision of a statute should normally be read in relation to its fellows, but particularly so here because Congress explicitly linked subsection (g) of § 202 to "any requirements under this section." Effective price control depended on unimpeded access to relevant information. To that end, § 202 authorized the Administrator to impose the "requirements" of the section, and those from whom they were exacted were under duty of compliance by subsection (e), while subsection (g) barred any excuse from compliance by a claim of privilege against self-crimination by the assurance of immunity from prosecution.<sup>2</sup>

Subsections (a), (b), (c) and (e) impose these four requirements: persons engaged in the vast range of busi-

The entire § 202 of the Emergency Price Control Act of 1942, as amended, is as follows:

<sup>&</sup>quot;(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

<sup>(</sup>b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpens require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

<sup>&</sup>quot;(c). For the purpose of obtaining any information under subsection (a), the Administrator may by subpens require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

<sup>&</sup>quot;(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such

ness subject to the Act may be required to (1) make and keep records, (2) make reports and (3) permit the inspection and copying of records and other documents; such persons as well as others may be required to (4) "appear and testify or to appear and produce documents, or both, at any designated place." An unconstrained reading of

person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

"(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

"(f) Witnesses subpensed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the

United States.

"(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U.S. C.; 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

"(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the

national defense and security.

"(i) Any person subpensed under this section shall have the right to make a record of his testimony and to be represented by counsel." 56 Stat. 23, 30, as amended by § 105 of the Stabilization Extension Act of 1944, 58 Stat. 632, 637, 50 U.S. C., Supp. V, § 922.

<sup>3</sup> Technically there is an additional or fifth requirement—to furnish information "under oath or affirmation or otherwise"—but this re-

quirement is really covered by the other four.

subsection (g) insured prompt compliance with all these requirements by removing any excuse based on the privilege against self-crimination.

Here the Administrator required the petitioner to "keep and make available for examination by the Office of Price Administration . . . records of the same kind as he has customarily kept . . . ." § 14 (b), MPR 426, 8 F. R. 9546. The Government contends that because the records of petitioner's own business, those that he "customarily kept," were required to be so kept by the Administrator, he was compelled to disclose their contents even though they may have incriminated him, and that he was afforded no immunity under subsection (g) because he was not disclosing what were really his records. Surely this is to devitalize the phrase "any requirements under this section" if not to render it meaningless.

The Court supports this devitalization with the "short answer" that the immunity provided does cover compliance with any of these requirements as to which a person-would have been excused from compliance because of his constitutional privilege. The short reply is that, bearing in mind the Court's conclusions as to the scope of the constitutional privilege, only the fourth requirement appears to be thus covered. I do not wish to lay two much stress on the Court's singular interpretation of the plural "requirements." Plainly, the Court construes § 202 (g) as according immunity only to oral testimony under oath and to the production of any documents which the Administrator did not have the foresight to require to be kept.

The Court thus construes the words "complying with any requirements under this section" to read "appearing

The Administrator required this petitioner to keep "records of the same kind as he has customarily kept." § 14 (b) of Maximum Price Regulation No. 426, 8 Fed. Reg. 9546. As a practical matter, therefore, the statute as construed by the Court provides immunity only for compelled oral testimony.

and testifying or producing documents other than those required to be kept pursuant to this section." Construction, no doubt, is not a mechanical process and even when most scrupulously pursued by judges may not wholly escape some retrospective infusion so that the line between interpretation and substitution is sometimes thin. But there is a difference between reading what is and rewriting it. The Court here does not adhere to the text but deletes and reshapes it. Such literary freewheeling is hardly justified by the assumption that Congress would have so expressed it if it had given the matter attentive consideration.5 In the Monia case the Court, having concluded that a similar question was present, had no difficulty in answering: "It is not for us to add to the legislation that Congress pretermitted." 317 U. S. at 430.

<sup>&</sup>lt;sup>5</sup> But cf. Carroll, Through the Looking Glass, c. 6:

<sup>&</sup>quot;'The question is' said Alice, 'whether you can make words mean so many different things.'

<sup>&#</sup>x27;The question is,' said Humpty Dumpty, 'which is to be the master—that's all.'"

knowledging that "the literal language of the Compulsory Testimony Act possibly may be so read" as to support the present claim of immunity. But it urges that nothing in the "language or legislative history" of § 202 (g) requires a broader immunity than an adjudication of the scope of the constitutional privilege would exact.

The language yields no support for the Government's sophisticated reading adopted by the Court. Nor is there anything in the legislative history to transmute the clear import of § 202 into esoteric significance. So far as it bears upon our problem, the legislative history of the Act merely shows that § 202 in its entirety was included for the purpose of "obtaining information." Nothing in that history throws any light upon the scope of the immunity afforded by subsection (g). What is there in this silence of Congress that speaks so loudly to the Court? What are the "inescapable implications of the legislative history" that compelled its extraordinary

Indeed, the only reference to the immunity provision in the legislative documents, see footnote 6 supra, consists merely of practically verbatim repetitions of the provision.

See H. R. 5479, 77th Cong., 1st Sess., as introduced on August 1, 1941, in the House of Representatives and referred to the Committee on Banking and Currency, at p. 8; H. R. 5990, 77th Cong., 1st Sess., as reported out by the Committee on November 7, 1941, at p. 12 (at the conclusion of the hearings on H. R. 5479, the Committee directed its chairman to introduce this new bill representing the old bill as amended by the Committee in executive session; see H. Rep. 1400, 77th Cong., 1st Sess., p. 3); H. Rep. 1400, supra, at p. 9; 87 Cong. Rec. 9073, 9231; id. at 9282 (Wolcott amendment to strike out all of § 202 because previous amendment of the bill rendered this section for "obtaining information" redundant); id. at 9233 (Wolcott amendment adopted by the House); S. Rep. No. 931, 77th Cong., 2d Sess., p. 21 (H. R. 5990, as passed by the House, amended by reinstating § 202 for the purpose of "obtaining information"); and see finally the Conference Report accompanying H. R. 5950, H. Rep. 1658, 77th Cong., 2d Sess., pp. 25-26 (agreeing to § 202).

reading of this statute? Surely, the fact that the Administrator's authority to require the keeping of records and the making of reports was stricken from the bill on its original passage through the House but was eventually reinserted, merely indicates that Congress finally concluded that obtaining information was necessary for effective price regulation.

But the Court reads into § 202 (g) the meaning that "they" put upon the record-keeping provisions that Congress thus reinserted into the bill. "They," the "general Counsel for the OPA," appeared and testified orally at the Senate Hearings and, in urging restoration of the

The House originally struck out the entire § 202 because a previously adopted amendment had made the section "redundant." 87 Cong. Rec. 9232-9233. The previously adopted amendment had inserted a § 203 (a) which simply previded that:

<sup>&</sup>quot;The Administrator and the Board of Administrative Review or any member or commissioner thereof may administer on the and affirmations, may require by subpena or otherwise the attendance and testimony of witnesses and the production of documents at any designated place. No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 ed., title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege." Id. at 9226.

As passed by the House then, the bill would have authorized the Administrator to require the production of the records here in issue, but there would have been no question of their being "public" records, and petitioner would clearly have been accorded the immunity herein claimed. The House Managers yielded as to the record-keeping requirements and the reinstatement of the entire § 202, but there is no mention in their report of the provisions of subsection (g), let alone any indication that there was any difference intended in the scope of the immunity accorded by the two bills.

Hearings before the Senate Committee on Banking and Currency on H. R. 5990, 77th Cong., 1st Sess., at pp. 68-71, 112-23, 144-60, 174-81, 550-53.

licensing (§ 205 (f)) and record-keeping provisions, secured permission to file various briefs and documents with the Committee.10 While there is nothing in the General Counsel's oral testimony that sheds light upon our problem, it does appear from one of the exhibits filed by him that the Court has correctly determined the far-reaching construction that he had given to provisions which the House had rejected as "redundant." But our task is to determine, as best we can, what Congress meant—not what counsel sponsoring legislation, however disinterestedly, hoped Congress would mean. If counsel's views had been orally expressed to the Committee,12 the Committee might have given some indication of its views. But even if upon such disclosure of counsel's views the Committee had remained silent, this would hardly have furnished sufficient evidence to transmute the language that Congress actually employed to express its meaning into some other meaning.

To attribute to Congress familiarity with, let alone acceptance of, a construction solely by reason of the fact that our research reveals its presence among the 60,000-word memoranda which the Chairman of the Senate Committee permitted the General Counsel of the O. P. A. to file, is surely to defy the actualities of the legislative process. Is there the slenderest ground for assuming that members of the Committee read counsel's submission now relied upon by the Court? There is not a reference to the contentions of the O. P. A., wholly apart from that brief, in any report of a committee of either House or

<sup>10</sup> Id. at 154, 175, 180-81.

<sup>11</sup> Bee footnote 8 supra.

<sup>&</sup>lt;sup>12</sup> Every reference in the Court's opinion to p. 181 et seq. of the hearings is to the General Counsel's brief—an exhibit—, not to oral testimony.

in any utterance on the floor of either House.<sup>13</sup> The fact of the matter is that the House had passed the measure before the brief, in type smaller than that of the footnotes in this opinion, appeared in a volume of hearings com-

18 I do not dispute either (a) that the hearings (including the brief as an exhibit thereto) were printed and available before the Senate passed the bill, or (b) that there is a possibility that a curious Senator (but not a Representative) might have read all this fine prifit. I mean merely to suggest (a) that in view of the times, the typography, and the length of the text, the chances are remote, and (b) that in view of the importance of the issue it is indeed a hazardous matter to attribute positive congressional meaning to such an improbable source. While it may be presumed that the Senate subcommittee revised the House bill "in the light of the hearings," all that means is that they heard what they heard-it does not mean that they read everything they might have read. It would be enough to attribute to a diligent committeeman familiarity with transcribed oral testimony of such volume as that on this bill. But cf. id. at 15: "Senator BARKLEY. Mr. Chairman, none of us have read the Marings in the House-or maybe a few of us have"; id. at 26: "Senator TAPT. 1 have not read the House hearings, I am ashamed to say."

On January 26, 1942, Representative Gifford stated on the floor of the House:

"But this licensing business, 'Compulsory loyalty will crack sooner than the genuine kind.' During the last World War it was loyalty by cooperation. They had licensing, yes, on food products and on fuel, but little of anything else. If the licensee was punished, it was only a slap on the wrist. If he would contribute to the Red Cross he was forgiven. I have a compiled brief on the licensing methods that I could go into at length. An hour would be necessary to properly discuss it and to recite the experiences of ours and other nations. Canada now has it. Let me read to you their statement of policy. These restrictions are not designed to curtail business operations in any way. But by placing every person who in any way handles the commodities named in the order under license, the Board will have the machinery with which to make speedy checks on available stocks and to police more effectively any price-fixing order which maybe instituted." (88 Cong. Rec. 672.)

To trace knowledge of the O. P. A. brief to a congressional reader by assuming from this statement that Representative Gifford, who

prising 560 pages (part of the three volumes of House and Senate Hearings containing 2,865 pages). The Government, in cubmitting to us the legislative history of the immunity provision with a view to sustaining its claims, did not pretend that the Congress was either aware of the brief or accepted the construction it proffered. The suggestion that members of a congressional committee have read, and presumptively agreed with, the views found in a memorandum allowed to be filed by a witness and printed in appendix form in the hearings on a bill, let alone that both Houses in voting for a measure adopted such views as the gloss upon the language of the Act which it would not otherwise bear, can only be made in a Pickwickian sense. It is hard to believe that even the most conscientious members of the Congress would care to be charged with underwriting views merely because they were expressed in a memorandum filed as was the O. P. A. brief; on which so much reliance is placed in the Court's opinion. If the language of a statute is to be subjected to the esoteric interpretative process that the suggested use of the O. P. A. brief implies, since it is the common

opposed the adoption of these provisions of the bill, was such a reader, and from that to attribute to Congress knowledge of what was in an exhibit to a committee hearing, is so attenuated a process of inferential reasoning as to discredit the whole paraphernalia of legislative history. That the Congress itself does not care to be charged with knowledge of all the extraneous matter for which either House has granted leave to print in the Record is apparent from the rules of the Joint Committee on Printing providing that "the same shall be". published in the Appendix" and "in 61/2 point type." See Cong. Rec., Dec. 11, 1947, p. A5039. There is, moreover, little basis for concluding that the Gifford "compiled brief" was the O. P. A. briefdifferent briefs frequently quote from the same authority. On the contrary, the O.P. A. brief hardly presented the argument that "Compulsory loyalty will crack sooner than the genuine kind," nor did it. contain material demonstrating either the narrow scope or the weaknesses of World War I licensing.

practice to allow memoranda to be submitted to a committee of Congress by interests, public and private, often high-minded enough but with their own axes to grind, great encouragement will be given to the temptations of administrative officials and others to provide self-serving "proof" of congressional confirmation for their private views through incorporation of such materials. Hitherto unsuspected opportunities for assuring desired glosses upon innocent-looking legislation would thus be afforded.

We agree with the Government that Congress gave the Administrator broad powers for obtaining information as an aid to the administration and enforcement " of the Act, and that "The immunity provision of Section 202 (g) was inserted to insure a full exercise of these powers unhampered by the assertion of the privilege against self-incrimination." Certainly. But how does it follow that Congress thereby intended sub silentio to effectuate this broad purpose by confining the immunity accorded within the undefined controversial scope of the Fifth Amendment? One would suppose that Congress secured its object, as this Court held in the Monia case, by giving

<sup>&</sup>lt;sup>14</sup> Putting the word "enforcement" in \$ 202 (a) in italics does little to solve our problem of statutory construction—for enforcement means enforcement. The word is hardly enervated by the extension of immunity to the person compelled to disclose his books and records. The information thus obtained might well assist the Administrator in the enforcement of the Act against the suppliers of, buyers from, or competitors of the owner of the records. As to his suppliers, the records would of course disclose compliance with maximum price regulations; as to the buyers, many regulations established maximum price on a cost-plus basis and the information obtained would be essential to proof of violation; as to the competitors, many regulations established maximum price for new sellers on the basis of their closest competitors, and here again the information obtained might well be essential to the enforcement of the Act.

immunity and so taking away contentions based on the constitutional privilege.

Plainly, it would have sufficed to dispose of the present controversy by holding that Congress graded immunity by § 202 (g) to persons who produced their own records, as were the records in this case, and not in their possession as custodians of others, even though required to be kept by § 202. To adapt the language of Mr. Justice Holmes, words have been strained by the Court more than they should be strained in order to reach a doubtful constitutional question. See Blodgett v. Holden, 275 U. S. 142, 148.

And so we come to the Court's facile treatment of the grave constitutional question brought into issue by its disposition of the statutory question. In the interest of clarity it is appropriate to note that the basic constitutional question concerns the scope of the Fifth Amendment, not the validity of the Price Control Act. The Court has construed the immunity afforded by § 202 (g) of the Act as co-extensive with the scope of the constitutional privilege against self-incrimination. Thus construed, the subsection is of course valid, since, by hypothesis, it affords a protection as broad as the Fifth Amendment. Counselman v. Hitchcock, 142 U.S. 547; Brown y. Walker, 161 U. S. 591. The vice of this construction—and the importance of the point warrants its reiteration-is precisely that it necessitates interpretation of the Constitution instead of avoiding it.15 And if the precedents mean anything this course will be followed in every future case involving a question of statutory immunity.

<sup>15</sup> Needless to say, the constitutionality of the Fifth Amendment is not raised!

The Court hardly finds a problem in disposing of an issue far-reaching in its implications for there is involved a drastic change in the relations between the individual and the Government as hitherto conceived. The Court treats the problem as though it were almost self-evident that when records are required to be kept for some needs of Government, or to be kept in a particular form, they are legally considered governmental records and may be demanded as instruments of self-crimination.

Ready-made catch-phrases may conceal but do not solve serious constitutional problems. "Too broadly generalized conceptions are a constant source of fallacy." Holmes, J., in Lorenzo v. Wirth, 170 Mass. 596, 600. Here the fallacy can be traced to the rephrasing of our problem into terms "to which as lawyers the judges have become accustomed," ibid.; then, by treating the question as though it were the rephrased issue, the easy answer appears axiomatic and, because familiar, authoritative. Subtle-question-begging is nevertheless question-begging. Thus: records required to be kept by law are public records; public records are non-privileged.

If records merely because required to be kept by law ipso facto become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume.

The Congress began its history with such legislation. Chapter I of the Laws of the First Session of the First Congress—"An Act to regulate the Time and Manner of administering certain Oaths"—contained a provision requiring the maintenance of records by persons admin-

istering oaths to State officials. 1 Stat. 23, 24. Chapter V—"An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandise imported into the United States"—contained a provision requiring an importer to produce the original invoice and to make a return concerning the consigned goods with the collector of the port of arrival. 1 Stat. 29, 39-40.

Every Congress since 1789 has added record-keeping and reporting requirements. Indeed, it was the plethora of such provisions that led President Roosevelt to establish the Central Statistical Board in 1933 and induced the enactment, in 1942, of the Federal Reports Act, 56 Stat. 1078. See, generally, Report of the Central Statistical Board, H. Doc. No. 27, 76th Cong., 1st Sess.; Centralization and Coordination of Federal Statistics-Report to the Committee on Appropriations of the House of Representatives, December 4, 1945, 91 Cong. Rec. A5419. On April 25, 1939, the Central Statistical Board reported that, "Since the end of 1933, the Board has reviewed in advance of dissemination more than 4.600. questionnaires and related forms and plans proposed for use by Federal agencies. The records for the past 2 years show that the Board has received forms from 52 Federal agencies and a number of temporary interdepartmental committees." See Hearings before the House Committee on Expenditure in the Executive Departments on H. R. 5917. 76th Cont., 1st Sess., at p. 32. The Board, on the basis of a comprehensive survey of the financial and other reports and returns made to 88 Federal agencies by private individuals, farms, and business concerns during the fiscal year ending June 30, 1938, informed Congress as follows:

"Counting both the administrative and the nonadministrative reports and returns, the Board's inquiry revealed that some 49,600,000 of the total during

the year were collected in accordance with statutory provisions specifically authorizing or directing the collection of reports of the types called for. proximately 55,000,000 returns were collected by agencies in connection with their performance of functions which were specifically authorized by statutes, although the statutes did not specify the reports. In such cases the information sought was obviously necessary in carrying out required func-Nearly 27,000,000 returns were collected by Federal agencies on report forms for each of which the legal authority was too general or too indefinite to permit its clear definition. The remaining 5,000,000 returns were made under a variety of types of legal authorities including authorizations implied in appropriations made specifically to support the collection of the reports.

"Somewhat less than half of the returns made to Federal agencies on all forms ... were mandatory by law, in the sense that a penalty is prescribed in case of failure of the respondent to file a required report. Some of these mandatory returns are very elaborate, and as a consequence over 60 percent of the total number of answers on report forms, other than applications, were in accordance with mandatory requirements." (H. Doc. No. 27, supra, at 11-12.)

I do not intend by the above exposition to cast any doubt upon the constitutionality of the record-keeping or reporting provisions of the Emergency Price Control Act or, in general, upon the vast number of similar statutory-requirements. Such provisions serve important and often indispensable purposes. But today's decision can hardly fail to hamper those who make and those who

execute the laws in securing the information and data necessary for the most effective and intelligent conduct of Government.

The underlying assumption of the Court's opinion is that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs, because those affairs also have aspects of public interest, become "public" records in the sense that they fall outside the constitutional protection of the Fifth Amendment. The validity of such a doctrine lies in the scope of its implications. The claim touches records that may be required to be kept by federal regulatory laws, revenue measures, labor and census legislation in the conduct of business which the understanding and feeling of our people still treat as private enterprise, even though its relations to the public may call for governmental regulation, including the duty to keep designated records.

If the records in controversy here are in fact public, in the sense of publicly owned or governmental, records, their non-privileged status follows. See Davis v. United States, 328 U. S. 582, 594, 602 (dissenting opinion). No one has a private right to keep for his own use the contents of such records. But the notion that whenever Congress requires an individual to keep in a particular form his own books dealing with his own affairs, his records cease to be his when he is accused of crime is

indeed startling.

A public record is a public record. If the documents in controversy are "public records" and as such non-privileged in a prosecution under the Price Control Act, why are they not similarly public and non-privileged in any sort of legal action? There is nothing in either the Act or the Court's construction of it to qualify their "public" nature. Is there any maintainable reason why

the Fifth Amendment should be a barrier to their utilization in a prosecution under any other law if it is no barrier here? These records were, as a matter of fact, required to be kept (and hence "public") quite apart from this Act. See Int. Rev. Code § 54 (a), and Treas. Reg. 111, § 29.54-1. If an examination of the records of an individual engaged in the processing and sale of essential commodities should disclose non-essential production, for example, why cannot the records be utilized in prosecutions for violations of the priorities or selective service legislation? Cf. Harris v. United States, 331 U. S. 145; but cf. Trupiano v. United States, 334 U. S.—

Moreover, the Government should be able to enter a man's home to examine or seize such public records, with or without a search warrant, at any time. If an individual should keep such records in his home, as millions do, instead of in his place of business, why is not his home for some purposes and in the same technical sense, a "public" library? Compare Davis v. United States, 328 U. S. 582, and Harris v. United States, supra, with the "well-stated" opinion in United States v. Mulligan, 268 F. 893; but see Trupiano v. United States, supra. This is not "a parade of horribles." If a man's records are "public" so as to deprive him of his privilege against self-crimination, their publicness inheres in them for many other situations.

Indeed, if these records are public, I can see no reason why the public should not have the same right that the Government has to peruse, if not to use, them. For, public records are "of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure." Evanston v. Gunn, 99 U. S. 660, 666. It would seem to follow, therefore, that these public records of persons engaged in what to the common understanding is deemed private enterprise should be generally

available for examination and not barred by the plea that the enterprise would thereby cease to be private.

Congress was guilty, perhaps, of no more than curious inconsistency when it provided in § 202 (h) of the Act for the confidential treatment of these "public" records. But the seeming inconsistency generally applies to information obtained by the Government pursuant to record-keeping and reporting requirements. See H. Doc. No. 27, supra, at pp. 26–28; 56 Stat. 1078, 1079; H. R. Rep. No. 1651, 77th Cong., 2d Sess., at pp. 4–5; ("We [the Bureau of the Census] do not even supply the Department of Justice or anybody else with that information") Hearings before the House Committee on Expenditures in the Executive Departments on H. R. 7590, 74th Cong., 1st Sess., at p. 63.

The fact of the matter, then, is that records required to be kept by law are not necessarily public in any except a word-playing sense. To determine whether such records are truly public records, i. e., not denuded of their essentially private significances, we have to take into account their custody, their subject matter, and the use sought to be made of them.

It is the part of wisdom, particularly for judges, not to be victimized by words. Records may be public records regardless of whether "a statute requires them to be kept," if "they are kept in the discharge of a public duty" either by a public officer or by persons acting under his direction. Evanston v. Gunn, supra. Chap-

<sup>&</sup>lt;sup>16</sup> For the text of § 202 (h) see note 2 supra. H. R. 5479 as originally introduced (see note 6 supra) would have left it to the Administrator to determine whether the information obtained should be deemed confidential. The bill was changed by the House Committee to its final form whereby the person furnishing the information could request confidential treatment so as to give such persons "further protection." H. R. Rep. 1409, 77th Cong., 1st Sess., p. 9. "Further" meant in addition to the statutory immunity afforded by § 202 (g)! Ibid.

ter I of the first statute passed by Congress, supra, is an example of an act requiring a public record to be kept.

Records do not become public records, however, merely because they are required to be kept by law. Private records under such circumstances continue to be private records. Chapter V of the Acts of the First Congress, supra, is an example of such a private record required to be kept by law.

Is there, then, any foundation for the Court's assumption that all records required to be kept by law are public and not privileged? Reliance is placed on language in Wilson v. United States, 221 U.S. 361. The holding in that case has no real bearing on our problem. Wilson, the president of a corporation, in answer to a subpena to produce refused to surrender the corporation's books and records on the ground that their contents would tend to incriminate him. He appealed to this Court from a judgment committing him for contempt. The case was disposed of on the ground that the books were the corporation's and not "his private or personal books," that the "physical custody of incriminating documents does not of itself protect the custodian against their compulsory production," and that, therefore, "the custodian has no privilege to refuse production although their contents tend to criminate him." 221 U.S. at 378, 380, 382. The Court concluded as follows:

"The only question was whether as against the corporation the books were lawfully required in the administration of justice. When the appellant became president of the corporation and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right

to retain the corporate books against any demand of government which the corporation was bound to recognize.

"We have not overlooked the early English decisions to which our attention has been called... but these cannot be deemed controlling. The corporate duty, and the relation of the appellant as the officer of the corporation to its discharge, are to be determined by our laws. Nothing more is demanded than that the appellant should perform the obligations pertaining to his custody and should produce the books which he holds in his official capacity in accordance with the requirements of the subpoena. None of his personal papers are subject to inspection under the writ and his action, in refusing to permit the examination of the corporate books demanded, fully warranted his commitment for contempt." (221 U. S. at 385-86.)

The Wilson case was correctly decided. The Court's holding boiled down to the proposition that "what's not yours is not yours." It gives no sanction for the bold proposition that Congress can legislate private papers in the hands of their owner, and not in the hands of a custodian, out of the protection afforded by the Fifth Amendment. Even if there were language in the Wilson opinion in that direction, an observation taken from its context would seem to be scant justification for resolving, and needlessly, "a very grave question of constitutional law, involving the personal security and privileges and immunities of the citizen." Boyd v. United States, 116 U. S. 616, 618.

The conclusion reached today that all records required to be kept by law are public records cannot lean on

the Wilson opinion. This is the language relied upon by the Court:

"The principle [that a custodian has no privilege as to the documents in his custody] applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained." (221 U.S. at 380.)

But Mr. Justice Hughes, the writer of the Wilson oping ion went on to note that "There are abundant illustrations. in the decisions" of this principle that a custodian has no privilege as to the documents in his custody just as no one has a privilege as to public or official records because they are not his private papers. He resorted to these illustrations concerning custodians because the dissenting opinion of Mr. Justice McKenna, while accepting the premise that public records were not privileged. quarreled with the Court's holding as to the absence of a custodian's privilege concerning non-public records, as follows: "As the privilege is a guaranty of personal liberty it should not be qualified by construction and a distinction based on the ownership of the books demanded as evidence is immaterial. Such distinction has not been regarded except in the case of public records, as will be exhibited by a review of the authorities." 221 U.S. at 388.

The illustrations utilized by Mr. Justice Hughes to meet this challenge raised by the dissent stand for the propositions that (a) a custodian has no privilege, and (b) public documents and records are non-privileged, but not at all on any notion that private records required to be kept by law are "public" records. Before analyzing the eleven precedents or illustrations thus employed, it is worthy of note that the illustrations were derived from the Government's brief. It is significant that that brief, by Solicitor General Frederick W. Lehmann, well-known for his learning, contained no reference to the "required records" doctrine. On the contrary the Government cited these cases to support its argument that: "The immunity granted by the Constitution is purely personal." 17

These are the "illustrations in the decisions:"

(1) Bradshaw v. Murphy, 7 C. & P. 612, where "it was held that a vestry clerk who was called as a witness could not on the ground that it might incriminate himself object to the production of the vestry books kept under the statute, 58 George III, chapter 69, § 2." (221 U. S. at 380.)

Comment.—This is an instance where records were required to be kept by a public officer (for such, in England, was a parish vestry clerk). Clearly the clerk had no privilege as to such records since (1) they were not his; he was merely their custodian, and (2) he was a public officer.

(2) State v. Farnum, 73 S. C. 165, where it was held that the dispenser of the State Dispensary had to disclose to a legislative committee the official books of that State institution.

Comment.—Under South Carolina law the dispenser was an officer of the State; the books were true public records: he was their custodian.

(3) State v. Donovan, 10 N. D. 203, where it was held that a register of sales of intoxicating liquor kept by a druggist pursuant to a statute providing that such record "shall be open for the inspection of the public at all

<sup>&</sup>lt;sup>17</sup> See summary of argument for the United States, 221 U. S. at 366. The Lehmann Brief deserves reading.

reasonable times during business hours, and any person so desiring may take memoranda or copies thereof" was a public record.

Comment.—The State court construed the statute to make the druggist a public officer and, as such, the custodian of the register for the State. The court quoted authority to the effect that the register was "the property of the state, and not of the citizen, and is in no sense a private memorandum." 10 N. D. at 209. Are we to infer from the Court's opinion in this case that the books and records petitioner customarily kept were not his property but that of the United States Government, and that they "shall be open for the inspection of the public at all reasonable times during business hours, and any person may take memoranda or copies thereof"? Ibid. and cf. Evanston v. Gunn, supra.

(4) State v. Davis, 108 Mo. 666, where it was held that a druggist had no privilege as to the prescriptions he filled

for sales of intoxicating liquor.

Comment.—Here the prescriptions were "required to be kept by law" but they constituted "public" records in the pure Wilson sense. The prescriptions belonged to the physicians or their patients, "and the druggist [was] merely their custodian." 108 Mo. at 671.

(5) State v. Davis, 69 S. E. (W. Va.) 639 (prescription-keeping case virtually identical with State v. Davis, 108

Mo, 666).

(6) People v. Coombs, 158 N. Y. 532, where it was held that a coroner had no privilege as to official inquest records, required to be filed with the county clerk, over his contention that they were private records because they were false and had been found in his own office.

Comment.—"The papers were in a public office, in the custody of a clerk who was paid by the city. On their face they were public records and intended to be used as such."

158 N. Y. at 539.

(7) L. & N. R. Co. v. Commonwealth, 51 S. W. (Ky.) 167, where it was held that a railroad corporation had no privilege as to a tariff sheet.

Comment.—The tariff sheet was "required by law to be publicly posted at the station, and was in fact so posted."

51 S. W. at 167. Petitioner is not a railroad corporation and his records were not "publicly posted."

(8) State v. Smith, 74 Iowa 580, where it was held that a pharmacist had no privilege as to the monthly reports of liquor sales that he had made to the county auditor pursuant to a statutory reporting requirement.

Comment.—The reports in the auditor's office were "public records of the office, which are open to the inspection of all, and may be used in evidence in all cases between all parties, when competent, to establish any fact in issue for judicial determination." 74 Iowa at 583-84. Petitioner's records were in his possession and were not open for public inspection.

- (9) State v. Cummins, 76 Iowa 133 (same as State v. Smith, supra).
- (10) People v. Henwood, 123 Mich. 317 (liquor sales reporting requirement held valid).
- (11) Langdon v. People, 133 Ill. 382, held that seizure pursuant to search warrant of official State documents unlawfully in appellant's possession constituted reasonable search—"They were not private papers." 133 Ill. at 398.

In summary of the authorities cited as illustrations of the principle recognized and applied by the Court in the Wilson case, then, it should be obvious that they neither stand for the proposition that the fact that private records are required to be kept by statute makes them public records by operation of law, nor did Mr. Justice Hughes misconstrue them in reaching the decision in the Wilson case.

Were there any doubt as to the point of the illustrations in the Wilson case, surely we could safely permit that doubt to be resolved by the Wilson opinion itself. After reviewing the illustrative cases, Mr. Justice Hughes observed:

"The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection," (221 U.S. 381-82.)

Evidently the dictum in the Wilson case and the authorities therein cited need to be bolstered for the use to which they are put in this case. We are told that "Other state supreme court decisions, subsequent to the Wilson case, similarly treat as non-privileged, records required by statute to be kept." These are the five instances cited:

(1) Paladini v. Superior Court, 178 Cal. 369, where it was held that the statutory procedure whereby the State Market Director could compel the production of the sales records of licensed fish dealers was valid.

were "non-privileged," but disposed of the contention that the statute violated the constitutional privilege against self-incrimination on the ground that "The proceeding before the state market director is not criminal in its nature, and the order compelling the petitioners to produce their books before the state market director was not in violation of the constitutional provision which prohibits a court or officer from requiring a defendant in a criminal case to furnish evidence against himself." 178

Cal. at 373. The court did dispose of the contention that the statute violated the Fourth Amendment of the United States Constitution on the ground that the records were not private. But the records here were public records because, since it was conceded that the fish belonged to the State, "They contain a record of the purchase and sale of the property of the state, by those having a qualified or conditional interest therein." Ibid. There is no suggestion in this case that petitioner's records were public records because his fruit and vegetables were the property of the United States Government.

(2) St. Louis v. Baskovitz, 273 Mo. 543, where a municipal ordinance requiring junk dealers to keep books of registry recording their purchases and providing that the books be open for inspection and examination by the police or any citizen was upheld against the contention that it violated the State constitutional provision against unreasonable searches and seizures for private purposes.

Comment.—The case was disposed of by the court's interpretation of the words "any citizen" as being limited in meaning to "one whose property has been stolen." 273 Mo. at 576. The records here were "required to be kept by statute," it is true, but the court had no occasion to, and did not, go into the question as to whether the records were "non-privileged."

(3) State v. Legora, 162 Tenn. 122, where a statute/requiring junk dealers to keep a record-of their purchases was upheld.

Comment.—A record which "shall at all times be open to the inspection of . . . any person who may desire to see the same," 162 Tenn. at 124, is, of course, a "public" record. Evanston v. Gunn, supra; cf. St. Louis v. Baskovitz, supra.

(4) State v. Stein, 215 Minn, 308, where a statute requiring licensed dealers in raw furs to keep records. of their sales and purchases was upheld.

Comment.—The records here were public records for the same reason that the records involved in the *Paladini* case were public records—"the state is the owner, in trust for the people, of all wild animals." 215 Minn. at 311.

(5) Financial Aid Corporation v. Wallace, 216 Ind. 114, where a statute requiring licensed small loan concerns to keep records and providing for their inspection by the State Department of Financial Institutions was upheld.

Comment.—The court had no occasion to, and did not, go into the question as to whether the records were either "public" or "non-privileged."

It appears to me, therefore, that the authorities give no support to the broad proposition that because records are required to be kept by law they are public records and, hence, non-privileged. Private records do not thus become "public" in any critical or legally significant sense; they are merely the records of an industry or business regulated by law. Nor does the fact that the Government either may make, or has made, a license a prerequisite for the doing of business make them public in any ordinary use of the term. While Congress may in time of war, or perhaps in circumstances of economic crisis. provide for the licensing of every individual business, surely such licensing requirements do not remove the records of a man's private business from the protection afforded by the Fifth Amendment. Even the exercise of the war power is subject to the Fifth Amendment. See, e. g., Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 155-56. Just as the licensing of private motor vehicles does not make them public carriers, the licensing of a man's private business for tax or other purposes, does not under our system, at least so I had supposed, make him a public officer.

Different considerations control where the business of an enterprise is, as it were, the public's. Clearly the records of a business licensed to sell state-owned property are public records. Cf., e. g., Paladini v. Superior Court, supra; State v. Stein, supra. And the records of a public utility, apart from the considerations relevant to corporate enterprise, may similarly be treated as public records. Cf., e. g., L. & N. R. Co. v. Commonwealth, supra; Financial Aid Corporation v. Wallace, supra. This has been extended to the records of "occupations which are malum in se, or so closely allied thereto, as to endanger the public health, morals, or safety." St. Louis v. Baskovitz, supra, at p. 554; cf., e. g., State v. Legora, supra; State v. Donovan, supra; State v. Smith, supra.

Here the subject matter of petitioner's business was not such as to render it public. Surely, there is nothing inherently dangerous, immoral, or unhealthy about the sale of fruits and vegetables. Nor was there anything in his possession or control of the records to cast a cloud on his title to them. They were the records that he customarily kept. I find nothing in the Act, or in the Court's construction of the Act, that made him a public officer. He was being administered, not administering. Nor was he in any legitimate sense of the word a "custodian" of the records. I see nothing frivolous in a distinction between the records of an "unincorporated entrepreneur" and those of a corporation. On the contrary, that distinction was decisive of the Wilson holding:

But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examinations of books." (221 U.S. at 382.)

And the Court quoted at length from Hale v. Henkel, 201 U. S. 43, 74-75:

".'. . . we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an exam-

ination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him.

"'Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises . . . . '" (221 U. S. at 383.)

The distinction between corporate and individual enterprise is one of the deepest in our constitutional law, as

it is for the shapers of public policy.

The phrase "required to be kept by law," then, is not a magic phrase by which the legislature opens the door to inroads upon the Fifth Amendment. Statutory provisions similar to § 202 (b) of this Act, requiring the keeping of records and making them available for official inspection, are constitutional means for effective administration and enforcement." It follows that those charged with the responsibility for such administration and enforcement may compel the disclosure of such records in conformity with the Fourth Amendment. See Boyd v. United States, supra, at pp. 623-24. But it does not follow that such disclosures are beyond the scope of the protection afforded by the Fifth Amendment. For the compulsory disclosure of a man's "private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit

<sup>18</sup> See note 14 supra.

the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." Id. at 632.

The Court in the Boyd case was fully cognizant of the sense and significance of the phrase "books required by law to be kept for their inspection." Id. at 623-24. Surely the result of that decision, if not the opinion itself, speaks loudly against the claim that merely by virtue of a record-keeping provision the constitutional privilege against self-incrimination becomes inoperative. The document in controversy in the Boyd ease was historically, and as a matter of fact, much more of a "required record" than the books and records the petitioner here "customarily kept." If the Court's position today is correct the Boyd case was erroneously decided."

<sup>19</sup> The Boyds had contracted to supply plate glass to the Government on a duty-free price basis. They contended that they had fulfilled this contract out of their stock on hand. They had previously secured a free entry of 29 cases of plate glass and claimed that this shipment replaced in part the glass that they had furnished the Government; the Government asserted that that shipment contained more than the amount of the glass furnished. After the Boyds had secured a free permit and entry of a second shipment of 35 cases of plate glass, but before delivery to them, the goods were seized and the free permit was revoked. In the proceedings for the forfeiture of the 35 cases, the Government, pursuant to the statutory procedure held unconstitutional by the Court, sought and secured production from the Boyds of the invoice covering the first shipment of the 29 cases. This invoice was a "record required to be kept by statute." The Act of July 31, 1789, required the importer to make an official entry with the collector at the port of arrival and there produce the original invoice to the collector. 1 Stat. 29, 39-40; as amended by the Act of August 4,° 1790, 1 Stat. 145, 161-62; as amended by the Act of March 2, 1799, 1 Stat. 627, 655-56 (invoice must be signed by collector; and see form of oath required to accompany invoice); as amended by the Act of April 20, 1818, 3 Stat. 433, 434, 436; as amended by the Act of March 1, 1823, 3 Stat. 729-30 (no entry without invoice unless importer gives bond to

In disregarding the spirit of that decision, the Court's opinion disregards the clarion call of the Boyd case: obsta principis. For, while it is easy enough to see this as a petty case and while some may not consider the rule of law today announced to be fraught with unexplored significance for the great problem of reconciling individual freedom with governmental strength, the Boyd opinion admonishes against being so lulled. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by

secure production of invoice within stated period), 737 (invoice, certified with collector's official seal, conclusive evidence of value of imported goods in any court of the United States); as amended by the Act of August 30, 1842, 5 Stat. 548, 564-65 (collector authorized to examine any importer and to require production of invoices); as amended by the Act of March 3, 1863, 12 Stat. 737-38 (required invoices to be in triplicate and indorsed prior to shipment to this country by a consular officer who "shall deliver to the person producing the same one of said triplicates, to be used in making entry of said goods, wares, or merchandise; shall file another in his office, to be there carefully preserved; and shall, as soon as practicable, transmit the remaining one to the collector of the port of the United States at which it shall be declared to be the intention to make entry of said goods, wares, or merchandise"), 740 (penalty for wilful destruction or concealment of invoices) and (district judge where it appears to his satisfaction that fraud on revenue has been committed or attempted shall authorize collector to seize invoices); as amended by the Act of June 30, 1864, 13 Stat. 202, 217-18 (invoice must be made out in the weights and measures of the country from which importation made); as amended by the Act of July 18, 1866, 14 Stat. 178, 187 (seizure of invoices); as amended by the Act of March 2, 1867, 14 Stat. 546, 547 (seizure of invoices); as amended by the Act of June 22, 1874, 18 Stat. 186, 187 (§ 5-seizure of invoicesheld unconstitutional in Boyd case). For administrative requirements as to form; contents, filing and keeping of invoices, in effect at time of entry involved in Boyd case, see General Regulations under the Customs and Navigation Laws (1884) Arts. 314-34; see also Elmes, Customs (1887) c. VII.

silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." *Id.* at 635.

Violators should be detected, tried, convicted, and punished—but not at the cost of needlessly bringing into question constitutional rights and privileges. While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the individual were not designed for short-cuts in the administration of criminal justice.

And so I conclude that the Court has misconstrued the Fifth Amendment by narrowing the range and scope of the protection it was intended to afford. The privilege against self-incrimination is, after all, "as broad as the mischief against which it seeks to guard." Counselman v. Hitchcock, supra, at p. 563. If Congress by the easy device of requiring a man to keep the private papers that he has customarily kept can render such papers "public" and non-privileged, there is little left to either the right of privacy or the constitutional privilege.

Even if there were authority for the temerarious pronouncement in today's opinion, I would insist that such authority was ill-founded and ought not to be followed. There is no such authority. The Court's opinion can gain no strength beyond itself. The persuasiveness of its opinion is not enhanced by the endeavor of the majority of the Court, so needlessly reaching out for a constitutional issue, to rest its ominous inroads upon the Fifth Amendment not on the wisdom of their determination but on blind reliance upon non-persuasive authority.

## SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1947.

The United States.

William Shapiro, Petitioner, On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 21, 1948.]

MR. JUSTICE JACKSON, with whom MR. JUSTICE MUR-PHY agrees, dissenting.

The protection against compulsory self-incrimination, guaranteed by the Fifth Amendment, is nullified to whatever extent this Court holds that Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who then can use it to convict him. Today's decision introduces a principle of considerable moment. Of course, it strips of protection only business men and their records; but we cannot too often remind ourselves of the tendency of such a principle, once approved, to expand itself in practice "to the limits of its logic." That it has already expanded to cover a vast area is apparent from the Court's citation of twenty-six federal statutes that present parallels to the situation here under review. It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to. decision of today, applying this rule not merely to records specially required under the Act but also to records "customarily kept," invites and facilitates that eventuality.

The practice approved today obviously narrows the protections of the Fifth Amendment. We should not attribute to Congress such a purpose or intent unless

it used language so mandatory and unmistakable that it left no alternative, and certainly should not base that inference on "legislative history" of such dubious meaning as exists in this case. Congress, if we give its language plain and usual meaning, has guarded the immunity so scrupulously as to raise no constitutional question. But if Congress had overstepped, we should have no hesitation in holding that the Government must lose some cases rather than the people lose their immunities from compulsory self-incrimination. However, in this case, the plain language of Congress requires no such choice. It does require, in my view, that this judgment be reversed.

## SUPREME COURT OF THE UNITED STATES

No. 49.—OCTOBER TERM, 1947.

William Shapiro, Petitioner, On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 21, 1948.]

MR. JUSTICE RUTLEDGE, dissenting.

With reservations to be noted, I agree with the views expressed by Mr. Justice Jackson, and with Mr. Justice Frankfurter's conclusions concerning the effect of the immunity provision, § 202 (g) of the Emergency Price Control Act.

With them I cannot accept the Court's construction of that section which reduces the statutory immunity to the scope of that afforded by the Fifth Amendment's prohibition against compulsory self-incrimination. This Court has not previously so decided. Nor, in my judg-

<sup>156</sup> Stat. 23, 30 [§ 202 (g)], as amended, 50 U. S. C. App. § 901, incorporating the provisions of the Compulsory Testimony Act of 1893, 27 Stat. 443, 49 U. S. C. § 46, quoted in the Court's opinion in note 2.

<sup>&</sup>lt;sup>2</sup> Neither Heike v. United States, 227 U. S. 131, nor Wilson v. United States, 221 U. S. 361, principally relied upon by the Court, approached such a ruling.

The Wilson case dealt only with corporate records, and the claim of a corporate officer having their custody to constitutional immunity against being required to produce them. None were required by law to be kept, in the sense that any federal law required that they be kept and produced for regulatory purposes. The only ruling was that a corporate officer has no personal immunity against producing corporate records, which are of course not his own, and that the corporation has no immunity of its own under the Fifth

ment, can the present decision be reconciled with the language of the statute or its purpose obvious on its face.

That wording compels testimony and the production of evidence, documentary or otherwise, regardless of any claim of constitutional immunity, whether valid or otherwise. But to avoid the constitutional prohibition and, it would seem clearly, also any delay in securing the information or evidence required the Act promises immunity "for or on account of any transaction, matter or

Amendment's guaranty. The decision is not pertinent to the presently tendered problem.

. The Heike decision is equally not apropos. The exact ruling was that the evidence, from the production of which the claimed right of immunity, constitutional as well as statutory, arose, "did not concern any matter of the present charge. Not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof much closer than that all were dealings of the same sugar company." 227 U.S. 131, 143. The actual ruling therefore apart from the fact that a corporate officer claimed immunity in large part for producing corporate records, see id., 142-143, was that the petitioner had not brought himself within the scope of the statutory authorization, namely, that the "transaction, matter or thing" concerning which he had testified had no substantial connection with the matters involved in his prosecution. The decision is authority for nothing more than that the impunity at the most does not attach when the constitutional claim precluded, but said to bring the statute into play, is insubstantial. The dictum stressed in the Court's opinion that the statute "should be construed, so far as its words fairly allow the construction, as coterminous with" (P. 142) the constitutional immunity, not only was unnecessary, but as the clause itself emphasized explicitly negatives exact equivalence. (Emphasis added.).

<sup>3</sup> The wording of the Compulsory Testimony Act neither requires nor suggests that the right to the immunity given should turn on the validity or invalidity of the gonstitutional claim which is precluded. At the least the Act would seem clearly to cover both valid and substantially doubtful ones.

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thing, concerning which he may testify, or produce evidence. in obedience to the subpoena.

The statute thus consists of a command and a promise. In explicit terms the promise is made coextensive with the command. It expressly precludes prosecution, forfeiture or penalty "for or on account of any transaction, matter or thing" concerning which evidence is produced in compliance with the subpoena. Compelling testimony and giving immunity "for or on account of any transaction, matter or thing, concerning which he may testify" is very different from compelling it and promising that, when given, the person complying "shall have only the immunity given by the Fifth Amendment and no more." To constrict the statute's wording so drastically is not simply to interpret, it is to rewrite the congressional language and, in my view, its purpose. If Congress had intended only so narrow a protection, it could easily have said so without adding words to lead witnesses and othersto believe more was given.

It may be, however, notwithstanding the breadth of the promissory terms, that the statutory immunity was not intended to be so broad as to cover situations where the claim of constitutional right precluded is only frivolous or insubstantial or not put forward in good faith. And if, for such a reason, the literal breadth of the wording may be somewhat cut down, restricting the statute's immunity by excluding those situations would neither

<sup>&</sup>lt;sup>4</sup> See the text of the Compulsory Testimony Act of 1893 quoted in note 2 of the Court's opinion.

The express limitation of the immunity to testimony or evidence produced in obedience to the subpoena excludes immunity for volunteered testimony or evidence, i. e., such as is given in excess of the subpoena's requirement. But the terms of the statute purport to exclude no other.

Cf. Heike v. United States, 227 U. S. 131. See note 2 supra.

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restrict the effect of the statutory words to that of the Amendment itself nor give them the misleading connotation of the Court's construction. Such a construction would not be departing widely from either the statute's terms or their obvious purpose to give immunity broader than the Amendment's, and would be well within the bounds of statutory interpretation. On the other hand, the Court's reduction of the statutory wording to equivalence in effect with the constitutional immunity, nearly if not quite makes that wording redundant or meaningless; in any event, it goes so far in rewriting the statutory language as to amount to invasion of the legislative function.

Whether one or the other of the two broader views of the statute's effect is accepted, therefore, it is neither necessary nor, I think, reasonable and consistent with the statutory wording and object or with this Court's function as strictly a judicial body to go so far in reconstructing what Congress has done, as I think results from reducing the statutory immunity to equivalence with the constitutional one.

Since it is not contended that there was not full compliance with the subpoena in this case, that compliance was excessive in the presently material portions of the evidence or information produced, or that the claim of constitutional immunity precluded was frivolous, insubstantial or not made in good faith, I think the judgment should be reversed by applying the statutory immunity, whether in one or the other of the two forms which may be applied.

In this view I am relieved of the necessity of reaching the constitutional issue resulting from the Court's construction, and I express no opinion upon it except to say that I have substantial doubt of the validity of the Court's conclusion and indicate some of the reasons for this. I have none that Congress itself may require the

keeping and production of specified records, with appropriate limitations, in connection with business matters it is entitled to and does regulate. That is true not only of corporate records, Wilson v. United States, 221 U. S. 361, but also of individual business records under appropriate limitations and specification, as the numerous instances cited in Mr. JUSTICE FRANKFURTER'S opinion illustrate.

But I seriously doubt that, consistently with the Fourth Amendment, as well as the prohibition of the Fifth against compulsory, self-incrimination, Congress could enact a general law requiring all persons, individual or corporate, engaged in business subject to congressional regulation to produce, either in evidence or for an administrative agency's or official's examination, any and all records, without other limitation, kept in connection with that business. Such a command would approach too closely in effect the kind of general warrant the Fourth Amendment outlawed. That would be even more obviously true, if there were any difference, in case Congress should delegate to an administrative or executive official the power to impose so broad a prohibition.

The authority here conferred upon the Administrator by the Emergency Price Control Act, in reference to record-keeping and requiring production of records, closely approaches such a command. Congress neither itself specifies the records to be kept and produced upon the Administrator's demand nor limits his power to designate them by any restriction other than that he may require such as "he deems necessary or proper to assist him," § 202 (a), (b), (c), in carrying out his functions of investigation and prescribing regulations under, as well as of administration and enforcement of, the Act. And as the authority to specify records for keeping and production was carried out by the Administrator, the only limitation imposed was that the records should be such

as had been "customarily kept.". § 14 (b), M. P. R. 426, 8 Fed. Reg. 9546, 9549. Such a restriction is little, if any, less broad than the one concerning which I have indicated doubt that Congress itself could enact consistently with the Fourth Amendment.

The authorization therefore is one which raises serious question whether, by reason of failure to make more definite specification of the records to be kept and produced, the legislation and regulations involved here do not exceed the prohibition of the Fourth Amendment against general warrants and unreasonable searches and seizufes. There is a difference, of course, and often a large one, between situations where evidence is searched out and seized without warrant, and others where it is required to be produced under judicial safeguards. But I do not understand that in the latter situation its production can be required under a warrant that amounts to a general one. The Fourth Amendment stands as a barrier to judicial as well as executive or administrative excesses in this respect.

Although I seriously question whether the sum of the statute, as construed by the Court, the pertinent regulations, and their execution in this case does not go beyond constitutional limitations in the breadth of their inquiry, I express no conclusive opinion concerning this, since for me the statutory immunity applies and is sufficient to

require reversal of petitioner's conviction.

